

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1937

217

No. 7055

HARRY H. WOODRING, SECRETARY OF WAR, AND H. A.
A. SMITH, GENERAL PURCHASING OFFICER AND
CHIEF OF WASHINGTON OFFICE, PANAMA CANAL,
APPELLANTS

vs.

JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL
BANK OF WASHINGTON, D. C.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

FILED OCTOBER 26, 1937

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THE DISTRICT OF COLUMBIA

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JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL
BANK OF WASHINGTON, D. C., APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

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A In the District Court of the United States for the District of
Columbia

No. 59007. In Equity

NORMAN R. HAMILTON, RECEIVER, DISTRICT NATIONAL BANK OF
WASHINGTON, D. C., A CORPORATION, PLAINTIFF

vs.

GEORGE H. DERN, SECRETARY OF WAR, ARTHUR L. FLINT, GENERAL
PURCHASING OFFICER, AND CHIEF OF WASHINGTON OFFICE, THE
PANAMA CANAL, CREED FULTON COX, CHIEF OF BUREAU OF INSULAR
AFFAIRS, WAR DEPARTMENT, C. F. BROWN, DISBURSING AGENT, PHIL-
IPPINE REVENUE, BUREAU OF INSULAR AFFAIRS, WAR DEPARTMENT,
DEFENDANTS

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the United States
for the District of Columbia, at the City of Washington, in said Dis-
trict, at the times hereinafter mentioned, the following papers were
filed and proceedings had, in the above-entitled cause, to wit:—

1 *Amended bill of complaint*

Filed June 4, 1936

In the Supreme Court of the District of Columbia

Holding an Equity Court

Equity 59007

NORMAN R. HAMILTON, RECEIVER, DISTRICT NATIONAL BANK OF
WASHINGTON, D. C., A CORPORATION, PLAINTIFF

vs.

GEORGE H. DERN, SECRETARY OF WAR, ET AL, DEFENDANTS

The amended bill of complaint of the plaintiff filed with leave of
Court first had and obtained, represents to this Honorable Court as
follows:

1. The plaintiff is a citizen of the United States, temporarily resid-
ing in the District of Columbia, and brings this suit as the duly
appointed and qualified Receiver of the District National Bank of
Washington, D. C., a national banking association organized under
the laws of the United States, formerly having its place of business
and conducting its operations in the District of Columbia, and as more
fully hereinafter shown.

2. The defendant, George H. Dern, is a citizen of the United States
temporarily residing in the District of Columbia. Said defendant is
Secretary of War of the United States and is sued as such in his official
capacity incident to the performance of his duties with reference to
the Canal Zone Territory on the Isthmus of Panama, and also incident

to the performance of his duties on behalf of the Government of the Philippine Islands, all as more fully hereinafter set forth.

2 3. The defendant, Arthur L. Flint, is a citizen of the United States and a resident of the District of Columbia, and is sued in his official capacity as General Purchasing Officer and Chief of Washington Office, The Panama Canal, as more fully hereinafter shown.

4. The defendant, Creed Fulton Cox, is a citizen of the United States and a resident of the District of Columbia, and is sued as Chief of the Bureau of Insular Affairs, War Department, as more fully hereinafter shown.

5. The defendant, C. F. Brown, is a citizen of the United States and a resident of the District of Columbia, and is sued as Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, as is hereinafter shown.

5 (a). The defendant, Henry Morgenthau, Jr., is a citizen of the United States, temporarily residing in the District of Columbia, and is sued as the custodian of certain funds claimed by plaintiff as assets of the District National Bank of Washington, representing the proceeds of certain bonds and certain other moneys paid under mistake of law to George H. Dern and Creed Fulton Cox and transmitted by them to The Chase National Bank of the City of New York and thereafter transmitted by said Chase National Bank to said defendant Henry Morgenthau, Jr.

5 (b). The defendants, and each of them, are sued in both their individual and official capacities.

6. The District National Bank of Washington, D. C., on, to-wit, March 5, 1933, was closed by Proclamation of the President of the United States and never thereafter reopened and was found and determined to be insolvent by the Comptroller of the Currency of the United States, who appointed a conservator on March 14, 1933, and thereafter, on November 6, 1933, plaintiff Norman R. Hamilton, was appointed Receiver of said bank and qualified as such and since such appointment and qualification has been, and now is, the Receiver of said bank acting in such capacity.

3 7. The plaintiff avers that by virtue of an Act of Congress of June 28, 1902 (described as the Spooner Act, Pub. No. 183, 32 Stat. 483), and by virtue of an Act of Congress of April 28, 1904 (Pub. No. 190, Chapter 1758, Page 429, 58th Congress, Second Session), and by virtue of an Executive Order and letter to the President of the United States, dated May 9, 1904, the Canal Zone Territory was placed under the supervision and direction of the Secretary of War, and the then Secretary of War did, on the 18th day of August, 1914, open a deposit account in said bank designated under the caption "Secretary of War, Canal Zone Funds, Call Account", in accordance with a certain contract entered into by the then Secretary of War and the District National Bank, a copy of which is hereto annexed and marked Exhibit "A" and made a part hereof by this reference; that at the date of closing of said District National Bank the credit balance on deposit in said account amounted to the sum of, to wit, \$200,000.00.

Plaintiff further avers that the then Secretary of War did on the 18th day of August, 1914, open a further deposit account in said

bank designated by the caption "Secretary of War, Canal Zone Funds, Checking Account" in accordance with the said contract entered into by the then Secretary of War and the District National Bank, marked Exhibit "A", hereto attached, and made a part hereof as aforesaid; that at the date of closing of said District National Bank the credit balance on deposit in said account amounted to the sum of, to-wit, \$14,739.80.

That under and by virtue of the terms of the aforesaid contract, said District National Bank did, from time to time, unlawfully and illegally pledge to and deposit with the then Secretary of War, by the delivery to his subordinate officer, the then General Purchasing Officer of the Panama Canal, certain of said bank's assets consisting of certain bonds of the aggregate par value of \$274,200.00, same being more fully described and set forth in the Appendix hereto attached marked Exhibit "B", and made a part hereof by this reference. That as heretofore averred, said pledge of assets by said bank was without authority of law and hence the then Secretary of War was without authority of law to receive and accept said assets so pledged as collateral security for said deposit account, or in any capacity other than in trust for said bank, and accordingly the then Secretary of War received said collateral in trust for said bank, and at the date of closing of said bank, and thereafter, said bonds were held in trust by defendant George H. Dern, Secretary of War, as Successor in interest to his predecessor to whom said bonds had been pledged as aforesaid.

That thereafter, to-wit, on September 24, 1933, the bonds described in Exhibit "B" hereof were sold to the Hamilton National Bank, of Washington, D. C., under an agreement and arrangement by the defendants, the Secretary of War, and the then General Purchasing Officer of the Panama Canal, with the then conservator of the District National Bank, whereby the Secretary of War was illegally paid, under a mistake of law, from the proceeds of the sale of said bonds, the sum of \$214,739.80, said sum amounting to the credit balance on deposit in the two accounts of Canal Zone funds deposited by the Secretary of War, as hereinbefore described, when said District National Bank closed, and an additional sum amounting to \$3,535.37 representing alleged accrued interest upon said deposit balances to and including September 24, 1933, said above described sums being paid to the Secretary of War and the General Purchasing Officer of the Panama Canal by the setting up of a new deposit account in the Hamilton National Bank of Washington, D. C., in the name of the Secretary of War Canal Zone Funds.

Plaintiff avers that said proceeds of the sale of said bonds so paid to the defendants, the Secretary of War and the General Purchasing Officer of the Panama Canal thereupon became a trust fund for the benefit of the depositors, creditors, and stockholders of said District National Bank and, as such, are recoverable by plaintiff from said Secretary of War and said General Purchasing Officer of the Panama Canal, together with interest on said sums of \$214,739.80 and \$3,535.37 at the legal rate from September 24, 1933, the date of said illegal payment, to the date of reimbursement or repayment of said sum to plaintiff as a trust fund for the benefit of the depositors and other creditors and stockholders of said District

National Bank, subject to such adjustments and deductions as said Secretary of War and said General Purchasing Officer of the Panama Canal may be entitled to receive by reason of a 5% distribution to all depositors and creditors of the District National Bank, of the amount of their balances or claims on March 1, 1933, and the further distribution of 50% on the amount of the provable claims of the depositors and other creditors of the District National Bank as allotted by the conservator thereof, and paid on September 24, 1933.

8. That Section 625 of the Revised Administrative Code of 1917 of the Philippine Islands authorized the Secretary of War to designate a depositary bank in the United States for the deposit of funds of the Government of the Philippine Islands, upon the placing by the depositary bank with the Bureau of Insular Affairs, of the War Department, of bonds of the United States satisfactory to and approved by the Secretary of War. That as of November 11, 1932, the then Secretary of War, purporting to act under authority of the aforesaid statute, designated said District National Bank as such depositary of moneys of the Government of the Philippine Islands
6 and approved, as Secretary of War, a bond given by said District National Bank to the then Government of the Philippine Islands providing for and covering the deposit of funds of the Government of the Philippine Islands in said District National Bank, a copy of said bond being hereto annexed, marked Exhibit "C", and made a part hereof by this reference. That under said contract deposits were made from time to time in said bank and were duly credited to an account captioned "Treasurer of Philippine Islands Gold Standard Fund Account," and at the date of closing of said District National Bank the credit balance on deposit in said account amounted to, to wit, \$751,801.40.

That purporting to act under the authority of the aforesaid statute, the said District National Bank without authority of law, pledged, and the then Secretary of War, through and by the then Chief of the Bureau of Insular Affairs of the War Department, under the supervision and direction of the Secretary of War, accepted certain assets of the District National Bank as collateral security for the payment of such amount as might be due under said deposit account; that at the date of closing of said District National Bank, the Secretary of War, through and by the then Chief of the Bureau of Insular Affairs, held, as pledgee to secure said deposit account, certain of the assets of said District National Bank, consisting of certain bonds of the par value of \$750,000.00, the same being more fully described and set forth in Exhibit "D" attached hereto and made a part hereof by this reference.

That on, to wit, August 11, 1933, said bonds (or others substituted in lieu thereof) were sold by defendant George H. Dern, Secretary of War, acting through and by the then Chief of the Bureau of Insular Affairs of the War Department, for the sum of, to wit, \$770,721.27, a schedule of the bonds so sold, and the price obtained therefor, being more fully set forth in Exhibit "E" hereto attached
7 and made a part hereof by this reference.

Plaintiff avers that the aforesaid Section 625 of the Revised Administrative Code of 1917 of the Philippine Islands did not constitute authority in law for the pledge by said District National

Bank of its aforesaid assets to the Secretary of War and to the Chief of the Bureau of Insular Affairs, and no authority otherwise existed in law for said pledge of assets by said District National Bank. Plaintiff therefore avers that said assets so pledged (or others substituted in lieu thereof) were received by the then Secretary of War, acting through and by the then Chief of the Bureau of Insular Affairs, and were subsequently acquired by their successors in office, including defendant George H. Dern, Secretary of War, and defendant Creed Fulton Cox, Chief of Bureau of Insular Affairs, subject to a trust in favor of said District National Bank, its depositors and creditors and stockholders. Plaintiff further avers that said trust continued and attached to the said bonds (or others substituted in lieu thereof) and to the proceeds of the sale of same as aforesaid, and defendant George H. Dern as Secretary of War, and defendant Creed Fulton Cox, as Chief of Bureau of Insular Affairs, War Department, and as successor to the Chief of said Bureau holding office at the time of said sale, are accountable as trustees under said trust to the plaintiff, as receiver of said banks for and on behalf of the depositors and other creditors and stockholders of said bank, for the proceeds of said sale of said bonds, together with interest at the legal rate upon the amount of said proceeds from the dates of sale of said bonds, subject to adjustment and deduction for such amount as may be found to be lawfully due the Government of the Philippine Islands as dividends upon the said deposit balance at suspension of said bank, on a parity with other general and unsecured creditors of said bank and subject to such further adjustment as may be necessary

8 arising from the erroneous payment on April 17, 1933, by the conservator, under mistake of law, to the Government of the Philippine Islands of the sum of \$25,000.00, and subject to such further adjustment as may be necessary arising from the erroneous payment on August 11, 1933, of \$6,620.55 as interest on \$750,000.00 from February 26, 1933, to April 16, 1933, at 2% and as interest on \$725,000.00 from April 17, 1933, to August 11, 1933, at 2%.

The plaintiff further avers that C. F. Brown is the Disbursing Agent of the Philippine Revenue, Bureau of Insular Affairs, War Department, and as such Disbursing Agent has in his custody and under his control, moneys of the Philippine Islands, and is the Chief Disbursing Agent of Philippine funds in the District of Columbia, and said defendant is sued in his official capacity as Disbursing Agent of funds of the Government of the Philippine Islands, from which the Court may direct the payment of any moneys found due this plaintiff.

8 (a). The plaintiff further avers that on to-wit the 11th day of August, 1933, the date the said bonds were sold, as heretofore described in paragraph 8 of the bill, the proceeds from the sale of said bonds were transmitted to and placed with the Chase National Bank of the City of New York and thereafter said proceeds, together with other moneys paid under mistake of law to George H. Dern and Creed Fulton Cox and transmitted to the Chase National Bank of the City of New York, or part thereof, were transmitted to and placed with Henry Morgenthau, Jr.; and plaintiff further avers, by reason of the facts set forth in said bill of complaint and this amendment, that said proceeds derived from the sale of said securities were funds of the

plaintiff herein, as were the moneys erroneously paid said George H. Dern and Creed Fulton Cox and transmitted by them to the Chase National Bank of the City of New York and by it to said Henry Morgenthau, Jr., and by reason of the foregoing said Henry Morgenthau, Jr., received said proceeds and now holds them in trust for plaintiff.

9. Plaintiff further avers that the funds claimed by him in the bill of complaint, as hereinbefore set forth, are not moneys of the United States are not part of the revenues of the United States, are not subject to the control of the Secretary of the Treasury of the United States in his official capacity as Secretary of the Treasury with respect to moneys of the United States, and said moneys hereinbefore claimed from the defendant, George H. Dern and Arthur L. Flint, in connection with their official position relating to the Panama Canal, are not moneys of the Panama Canal, and said moneys claimed from George H. Dern, Creed Fulton Cox, C. F. Brown and Henry Morgenthau, Jr. are not moneys of the Government of the Philippine Islands, and all of said moneys claimed by plaintiff in said bill of complaint are part of the trust assets of the insolvent District National Bank of Washington, D. C., belonging to the general creditors of the bank, out of which trust assets all creditors are entitled to be paid ratably. The plaintiff further avers that said funds hereinbefore claimed by plaintiff in the bill of complaint have not been covered into the Treasury of the United States or the Treasury of any state, territory, or other government. Plaintiff further avers that the District National Bank of Washington, D. C., was never designated by the Secretary of the Treasury under regulations prescribed by said Secretary, to receive deposits of the Government of the Canal Zone or the Government of the Philippine Islands, nor did the Secretary of the Treasury exact from said District National Bank of Washington, D. C. the pledges of securities which are the subject matter of this suit.

WHEREFORE, the premises considered, the petitioner prays:

10 1. That a writ of subpoena issue out of this Honorable Court to the defendants, and each of them, requiring them to appear and answer the exigencies of this Bill of Complaint.

2. That the defendants, George H. Dern and Arthur L. Flint, as Secretary of War and General Purchasing Officer and Chief of Washington Office, The Panama Canal, respectively, or their successors in office, be required to account to plaintiff for the sum of \$214,739.80, principal, and \$3,535.37, alleged accrued interest, paid on September 24, 1933, with interest thereon at the legal rate from September 24, 1933, the date of said payments as aforesaid, to the date of the repayment to plaintiff of said sums; subject to such credits as may be further due said defendants by reason of a 5% distribution as of March 1, 1933, to all of the bank's depositors, and a further dividend of 50% paid depositors as of September 24, 1933, upon provable claims allowed upon 95% of the credit balance of depositors when the bank went on a 5% restricted basis.

3. That George H. Dern, as Secretary of War, and Creed Fulton Cox, as Chief of the Bureau of Insular Affairs, War Department, and C. F. Brown, as Disbursing Agent of the Philippine Revenue, Bureau of Insular Affairs, War Department, be required to account to

plaintiff, as a trust fund for the benefit of the depositors, other creditors and stockholders of the insolvent District National Bank, for the sum of \$25,000.00, with interest thereon at the legal rate from April 17, 1933, subject to such offsets as may be interposed thereto, by reason of subsequent dividend payments in said bank.

4. That George H. Dern, as Secretary of War, and Creed Fulton Cox, as Chief of the Bureau of Insular Affairs, War Department, and C. F. Brown, as Disbursing Agent of the Philippine Revenue, Bureau of Insular Affairs, War Department, be required

11 to account to plaintiff, as a trust fund for the benefit of the depositors, and other creditors and stockholders of the insolvent District National Bank, for the sum of \$733,421.95, representing \$726,801.40 principal and interest due on March 1, 1933, in said account, \$6,620.55, representing alleged accrued interest due from March 1, 1933, to August 11, 1933, as adjusted, subject to such credits as may be available to said defendants by reason of dividend payments to depositors of the subject bank, and subject further to such adjustments as may be required for the reimbursement to plaintiff for interest on the moneys wrongfully paid from the dates of such payment to the date of the reimbursement to plaintiff.

5. That the defendant, C. F. Brown, as Disbursing Agent of the Philippine Revenue, Bureau of Insular Affairs, War Department, or his successor in office, be required to pay and satisfy any judgment or decree entered by this Court, in respect to funds of the Government of the Philippine Islands from such moneys as said C. F. Brown, or his successor in office, may have under their control or in their possession.

5 a. That the defendant, Henry Morgenthau, Jr., be required to account for and pay over to the plaintiff, as a trust fund for the benefit of the depositors and other creditors and stockholders of the insolvent District National Bank of Washington, so much of the proceeds from the sale of the bonds described in paragraph numbered 5 of the bill of complaint that have been transmitted to said Henry Morgenthau, Jr., from the Chase National Bank of the City of New York, together with such other moneys of plaintiff erroneously paid under mistake of law to George H. Dern and Creed Fulton Cox and thereafter transmitted by them to the Chase National Bank of the City of New York and by it transmitted to said Henry Morgenthau, Jr.

12 5 b. That the Court grant such discovery and accounting as the nature of the case may require in order to grant plaintiff the relief herein prayed.

6. And for such other and further relief as to this Honorable Court may seem just and proper.

NORMAN R. HAMILTON,
Receiver, District National Bank.

GEORGE P. BARSE,
Of Counsel.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, ss.:

Norman R. Hamilton, being first duly sworn, deposes and says that he has read the foregoing amended bill of complaint by him sub-

scribed and knows the matters and things therein contained are true to the best of his knowledge and belief.

NORMAN R. HAMILTON, *Receiver*.

Subscribed and sworn to before me this 4th day of June, 1936.

[SEAL]

WM. C. LOCKER,
Notary Public, D. C.

"Exhibit A"

THIS AGREEMENT, made at Washington, District of Columbia, this 18th day of August, 1914, between the SECRETARY OF WAR, the executive officer of the United States charged by the President with the supervision and control over the governmental affairs of the Canal Zone, and the DISTRICT NATIONAL BANK, of Washington, District of Columbia, a corporation organized and existing under the banking laws of the United States, hereinafter called the Bank,

WHEREAS, the administrative officers of the Canal Zone have collected and received, and will continue to collect and receive, hold, deposit, disburse and expend municipal, administrative district and various other funds, deposits, postal funds, and other obligations, securities, funds and moneys which may come into their custody, and

WHEREAS, the Secretary of War desires to secure a safe and sure place for the deposit, custody, safe-keeping and disbursement of said moneys and funds, and also an expeditious and effective method of auditing, inspecting examining, transferring and disbursing the said moneys and funds, and

WHEREAS, the Bank guarantees that it has a suitable, safe and convenient place for the deposit of the various funds, deposits, postal funds and other obligations, securities, funds and moneys which may come into the custody of the administrative officers of the Canal Zone, and that it is prepared to undertake the custody and safe-keeping of and accounting for said moneys and funds at its place of business and in its banking house in the District of Columbia,

NOW, THEREFORE, it is understood and agreed as follows:

ARTICLE I. That upon the execution and delivery of this agreement and the deposit with Major F. C. Boggs, Corps of Engineers, United States Army, General Purchasing Officer of The Panama Canal, of bonds as security therefor, as hereinafter provided, there will be deposited with the Bank at its banking house in the City of Washington, District of Columbia, such part of the moneys and funds above referred to and covered by this agreement as may be found convenient

and necessary. The deposits will be made in such amounts and at such times as may be practicable and convenient to the Collector of The Panama Canal, or to other officers and agents duly authorized by the Secretary of War.

ARTICLE II. That the Bank, in consideration of the benefits it will derive from being made such place of deposit, the mutual entering into of the agreement herein set forth, and the deposit with it of such moneys and funds, undertakes and agrees to receive and safely keep and disburse and properly account for all moneys and funds deposited with and turned over to it by the Collector of The Panama Canal, or by other agents, or representatives of the Secretary of War.

ARTICLE III. That the amount of the deposits made with the Bank shall be divided into two parts, one part to be known as the "call account" and the other part to be known as the "checking account." The division of funds between the two accounts shall be such that all funds deposited up to the time the Secretary of War gives notice to the Bank to establish a "checking account" shall be charged to the "call account," and that the balance on deposit in said Bank in excess of this sum shall be charged to the "checking account"; Provided, however, that the Secretary of War himself, or through his authorized representative, may order, in his discretion, after thirty days' notice, such changes by reduction or increase in the "call account", or by transfer from the "call" to the "checking account," or vice versa, as the interests of the service may require; and, provided further, that in case of emergency, checks may be drawn against the "call account" for immediate payment, it being understood, however, that such account shall not be subject to check, except in case of emergency, without written notice being given to the Bank thirty days before the draft is made on such "call account"; and, provided further, that all moneys on deposit with said
15 Bank may be placed either entirely in the "call account" or entirely in the "checking account", in the discretion of the Secretary of War.

ARTICLE IV. That the Bank shall pay interest on all moneys and funds deposited under this agreement, as follows:

On the "call account" interest shall be paid on the daily balances at the rate of three (3) per centum per annum, until the "checking account" is established.

When the "checking account" shall have been established, as provided in Article III hereof, interest shall be paid on the minimum monthly balances of the "call account" at the rate of three (3) per centum per annum.

On the "checking account" interest shall be paid on the daily balances at the rate of two and one-half ($2\frac{1}{2}$) per centum per annum.

It is understood and agreed that, on the first day of each month, all interest earned for the preceding month on each account shall be placed to the credit of the "checking account"; provided that if there be no "checking account" interest shall be placed to the credit of the "call account."

ARTICLE V. That the Bank shall accept and pay, without charge or discount, all bills, drafts, and checks drawn upon it by the Secretary of War, the Collector of The Panama Canal, or by other officers or persons duly authorized for that purpose, when said bills, drafts, or checks are properly presented or come to it for acceptances or payment, and drawn against said moneys and funds so deposited, and will promptly account for all moneys and funds received and pay over the balance at any time remaining in its hands of all and any moneys and funds so received by it to the said Collector of The Panama Canal, or other officers or persons duly authorized for the purpose by the Secretary of War, or by his succeeding lawfully designated governing authority of the Canal Zone, when called upon so to do.

16 ARTICLE VI. That the Bank on the first day of each month, and at such other times as it may be requested to do so, shall

render a statement of deposits and payments covering the preceding month, or part of month, to the Collector of The Panama Canal, or to such other officers or persons as shall be duly authorized for that purpose, and its books of account shall at all times show the amount of moneys and funds in the keeping of said Bank deposited under this agreement.

ARTICLE VII. That this agreement shall continue in force until terminated on written notice, which may be given at any time by either party to the other: Provided, however, that this agreement shall be immediately terminated should Congress by law direct its termination or give instructions concerning the funds covered by this agreement inconsistent with the terms hereof. In case this contract is terminated the Bank shall immediately pay to the Secretary of War, the Collector of The Panama Canal, or other officers or agents duly authorized for the purpose, any balance remaining to the credit of the account.

ARTICLE VIII. That, as security for the safe-keeping and prompt payment of the moneys and funds deposited under this agreement and the faithful performance thereof, the Bank shall deposit with Major F. C. Boggs, Corps of Engineers, United States Army, General Purchasing Officer of The Panama Canal, bonds of the acceptable value of a sum not less at any times than the amount of moneys and funds deposited under this agreement. Said bonds shall be deposited in the vaults of the American Security and Trust Company in accordance with an agreement of even date herewith, a copy of which is attached hereto and made a part hereof. The Bank agrees to increase the deposit with Major F. C. Boggs of acceptable bonds, as additional moneys and funds are deposited with it, in such

17 amount that the moneys and funds deposited under this agreement will at all times be fully secured by bonds of the following classes at the values specified: "United States, Philippine, Porto Rico, and District of Columbia bonds will be accepted at par; bonds of Hawaiian Territory at ninety (90) per cent, and, if otherwise satisfactory to the Secretary of War, or his representative, Philippine Railway bonds and those of States, municipalities, and high-grade railroads, such as are legal investments for savings banks in the States of New York, Massachusetts, Connecticut, or New Jersey, at ninety (90) per cent of their market value, but not exceeding ninety (90) per cent of their par value."

In the absence or inability of Major Boggs to act, his representative or successor as custodian of said bonds shall be designated by or with the approval of the Secretary of War.

ARTICLE IX. That, in the event the Bank fails to make prompt payment or fails to safely keep the moneys and funds deposited with it, or otherwise fails to faithfully perform all the provisions of this agreement, the said bonds shall become the property of the Secretary of War and may be either retained by him or may be sold, transferred and conveyed, in whole or in part, by the said Secretary of War or his duly authorized agent, as his absolute property, and the proceeds realized from the said sale or sales shall be applied by the said Secretary of War or his agent, to the liquidation of any amount due by the Bank under this agreement, any residue thereof, after said liquidation to be delivered to the Bank.

ARTICLE X. That all or any acts which may be performed, and all or any orders which may be given, by the Secretary of War under this agreement may be performed or be given by the Acting Secretary of War with the same force and effect as if they were performed or given by the Secretary of War himself.

18 IN WITNESS WHEREOF, the Secretary of War has signed this agreement in triplicate, and the Bank has caused it to be signed likewise in triplicate by its proper officers and its corporate seal affixed thereto the day and year first above written.

(Signed) LINDLEY M. GARRISON,
Secretary of War.

In the presence of:

(Signed) F. C. BOGGS.

[SEAL]

DISTRICT NATIONAL BANK,
Washington, D. C.

By (Sgd) ROBT. N. HARPER,
as its President.

Attest:

(Signed) EDMUND S. WOLFE,
as its Cashier.

Exhibit B

List of various and sundry bonds pledged by the District National Bank of Washington to A. L. Flint, general disbursing officer and chief of office, Panama Canal * * *

\$5,000.00 Par value, Federal Land Bank 4½'s 1933
49,000.00 Par value, Federal Land Bank 4½'s Bonds
90,000.00 Par value, Federal Land Bank 4½'s 1953
40,000.00 Par value, Federal Land Bank 4½'s 1936-56
45,000.00 Par value, Federal Land Bank 4½'s 1942-32
15,500.00 Par value, U. S. Treasury 3% Bonds 1951-55
11,200.00 Par value, U. S. 3¼% Treasury Notes, 1937
5,000.00 Par value City of San Francisco, 4½%, 1938
6,000.00 Par value City of Boston, Mass. 4¼%, 1939

\$274,200.00

19 *Order substituting party plaintiff*

Filed July 13, 1936

* * * * *

Upon consideration of the motion of the plaintiff in the above-entitled cause for leave to substitute Justus S. Wardell as plaintiff in the above-entitled cause in the place of Norman R. Hamilton, resigned, it is, by the Court, this 13th day of July, A. D., 1936

ORDERED, that the said Justus S. Wardell be, and he hereby is, substituted as plaintiff in the above-entitled cause in the place of Norman R. Hamilton, now resigned as Receiver of the District National Bank of Washington.

DANIEL W. O'DONOGHUE, *Justice.*

O. K.

DAVID A. PINE,
Asst. U. S. Atty.

Suggestion of death and substitution of parties defendants

Filed October 6, 1936

* * * * *

This cause having come on for further consideration, upon the suggestion made in open Court by counsel for the plaintiff and defendants herein of the death of defendants George H. Dern and Arthur L. Flint, and it appearing to the satisfaction of the Court that Harry H. Woodring has succeeded the decedent George H. Dern as Secretary of War and that H. A. A. Smith has succeeded the decedent Arthur L. Flint as General Purchasing Officer and Chief of Washington Office, The Panama Canal, it is by the Court this 6th day of October, 1936

ORDERED, That Harry H. Woodring be, and he hereby is, made a party defendant herein in the place and stead of George H. 20 Dern, deceased, and it is further ordered that H. A. A. Smith be, and he hereby is, made a party defendant herein in the place and stead of Arthur L. Flint, deceased.

ALFRED A. WHEAT, *Chief Justice.**Answer of defendants Woodring, et al., to amended bill*

Filed October 31, 1936

* * * * *

Come now, Harry H. Woodring, Secretary of War, H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, Creed Fulton Cox, Chief of Bureau of Insular Affairs, War Department, and C. F. Brown, Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, named defendants in the above-entitled cause, and for answer to the amended bill of complaint herein filed, or to such part or parts thereof as they are advised it is material for them to answer, answer and say:

1. Defendants admit the allegations contained in paragraph numbered 1 of said amended bill of complaint.

2. Defendants admit that George H. Dern was at the time of the filing of the amended bill of complaint, Secretary of War, but aver that he has since died and that Harry H. Woodring is now Secretary of War and as such, has been substituted as a party defendant in the place and stead of said George H. Dern.

3. Defendants admit that Arthur L. Flint was, at the time of the filing of the original bill of complaint, General Purchasing Officer and Chief of the Washington Office, Panama Canal, but aver that he died on or about May 18, 1936, and that H. A. A. Smith has succeeded him and has been substituted in his official capacity only 21 as a party defendant in the place and stead of said Arthur L. Flint; that his title in said office is now Chief of Office and General Purchasing Officer, Panama Canal.

4 & 5. Defendants admit the allegations of paragraphs 4 and 5 of said amended bill of complaint.

5 (a). These defendants admit the allegations concerning the citizenship and temporary residence of defendant Henry Morgenthau, Jr., as alleged in paragraph 5 (a).

5 (b). These defendants deny that Harry H. Woodring and H. A. A. Smith are sued as individuals in this cause; on the contrary, they aver that they are made parties in their respective official capacities only by substitution in place of their predecessors in office.

6. Defendants admit the allegations contained in paragraph numbered 6 of the amended bill of complaint.

7. Defendants Creed Fulton Cox, Chief of Bureau of Insular Affairs of the War Department and C. F. Brown, Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs of the War Department, aver that they have no knowledge of, interest in or concern with, the matters and things set forth in paragraph 7 of the said bill of complaint and that the allegations therein contained state no cause of action against them or either of them.

Defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, answering said paragraph numbered 7, admit that the Panama Canal Zone territory was placed under the supervision of the Secretary of War; they admit the opening of deposit accounts as specified, in the District National Bank pursuant to the contract entered into between the said Bank and the then Secretary of War as alleged in subparagraphs one and two of said paragraph 7; they also admit that the balances due at the time of the closing of said bank were as stated in said subparagraphs.

22 Said defendants admit the pledge of bonds of the amount and as described, and the deposit thereof with the then General Purchasing Officer of the Panama Canal as set forth in the third subparagraph of said paragraph numbered 7 but deny that said pledge and deposit were, or either of them was, unlawful and illegal or without authority of law; they further deny that the then Secretary of War was without authority to receive and accept the said securities as collateral for said deposits and deny that said securities were held in trust for the said District National Bank by the then Secretary of War or are so held by these defendants.

Said defendants admit the sale of the bonds or securities referred to, to the Hamilton National Bank, and the payment of the proceeds thereof in the sum specified and interest, in the manner and as alleged in subparagraph 4 of said paragraph 7 but deny that said payment was made illegally or under a mistake of law; on the contrary, these defendants aver that said sale and said payment were in all respects regular, lawful and in accordance with authority conferred upon the Secretary of War under Acts of Congress and regulations pursuant to statutory authority.

Said defendants deny that the said proceeds of the sale of the bonds were or are a trust fund, and deny that they are recoverable as such by plaintiff as alleged in subparagraph five of said paragraph 7.

Further answering said allegations, said defendants aver that the making of the contract for the deposit and delivery of said securities, a copy of which is made Exhibit "A" to the bill of complaint and is incorporated in this answer by reference, was within the authority and power of the Secretary of War conferred upon him by Acts of Congress and by regulations promulgated pursuant

23 to statutory authority; that the securities pledged pursuant to the terms of said contract were lawfully in the possession of defendant Secretary of War's predecessors in office; that the deposits for which said securities were pledged were at the time of the closing of said bank, almost entirely composed of moneys received by the Postal Service of the Canal Zone and consisted of deposit money order funds and money order funds, which the United States is obligated to redeem and pay.

Further, said defendants aver that by the Panama Canal Act of June 28, 1902 and the supplementary act of April 28, 1904, the President of the United States was given complete governmental control over the Canal Zone with power to legislate either directly or through the Isthmian Canal Commission, or such other persons as he might designate; that the President authorized the Secretary of War to exercise these powers on his behalf; that the then Secretary of War in 1904 directed the Isthmian Canal Commission to establish a postal service in the Canal Zone and said service was established by Act No. 7 of September 2, 1904, of the said Commission; Section 42 of said Act provided that the Postal Service of the Canal Zone should "be conducted, regulated, and controlled by such of the laws, rules, and regulations of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission," this provision being re-enacted in the Act of February 16, 1933, 47 Stat. 812, as a part of the Canal Zone Code then in course of enactment. Further, that by section 1 of the Act of August 21, 1912, c. 387, 37 Stat. 512, U. S. Code, Title 39, section 759, it was provided, with respect to Postal Savings funds of the United States, that such funds should be deposited in solvent banks, whether organized under national or State laws, being subject to national or state supervision and examination and that "the board of trustees shall take from such banks such securities

24 in public bonds or other securities, authorized by act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand." These defendants aver that the provision of said section insofar as it required security for postal savings funds was not inapplicable, but was applicable, to deposit money orders issued in the Canal Zone; and that it made it incumbent upon the Secretary of War and those under his supervision having direct control of the funds, to require security from banks before making deposits, and authorized the bank to give such security; further, that Section 2 of the Panama Canal Act of August 24, 1912, 37 Stat. 560, ratifying and confirming as valid and binding "all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government * * * of the Canal Zone" ratified and confirmed the directions and actions of the Secretary of War in requiring the deposit of securities to safeguard the public moneys of the Canal Zone under his supervision; further, that Section 6 of the Act of August 21, 1916, 39 Stat. 528, authorized the issue of deposit money orders in the Canal Zone, in lieu of postal savings certificates then in existence, and by Section 7 of said Act, ratified the action taken by the Secretary of

War in depositing money order funds in banks under Canal Zone regulations, and authorized the use of interest received therefrom to pay interest on deposit money orders, and any losses chargeable to the Canal Zone Postal Service, and that this was further ratified and confirmed by Section 11 of the Act approved September 21, 1922, increasing the interest rate on deposit money orders to not to exceed 3%; that in conformity with the orders of the President of October 22, 1916, and December 6, 1922, the Governor of The Panama Canal was authorized to prescribe detailed regulations to carry out the terms of the order, and that the Governor did, by Circular No. 660-61 of April 5, 1923, provide that:

“Postal savings, money order, clubhouse, and other trust and security funds received shall be remitted to depositories in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the Auditor.”

that is, the Auditor of the Panama Canal, whose position was established by Executive Order of the President, and who had supervision of the Department having charge of the “collection, custody, and disbursement of funds for the Panama Canal and Canal Zone.”

Further answering said paragraph 7, said defendants aver that the action of the Secretary of War in requiring security for the deposits aforesaid and in entering into the contract of August 18, 1914, was in accordance with a practice and custom, initiated in respect of Panama Canal funds, January 19, 1909 by a contract entered into on that date between the Commercial National Bank of Washington, D. C., and the Government of the Canal Zone, which contract was superseded by a contract dated May 11, 1910, between said bank and the Secretary of War and to which latter contract there was a supplemental agreement dated April 13, 1913; that the action of the Secretary of War and his subordinates in negotiating for the giving of security to safeguard deposits and of the entering into said contracts was the subject of correspondence between both the Secretary of War and The Panama Canal, and the Treasury Department, and was approved by the Secretary of the Treasury, and the entering into of the contract with the District National Bank, made a part of this answer by reference, was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury.

That said practice and custom were recognized, acted upon, and adopted in respect of other deposits of funds which were under the control of or administered by other departments or agencies of the United States and was continued without objection or question or challenge for more than twenty years and until after the closing of the various banks in which such funds were deposited.

These defendants further aver that said practice and custom were also known to the respective Comptrollers of the Currency during the period of more than twenty years since its inception and up to and subsequent to the sale of the securities complained of in the bill of complaint; that no objection thereto was ever raised or made by any of the said Comptrollers and the said practice and custom aforesaid were recognized and received and had the approval and sanction of said officials; that the Comptroller of the Currency was also aware

of the proposed sale of the said securities and made no objection thereto and took no action to prevent it but sanctioned and approved the said sale.

Further, that Congress was informed that security for deposits of Canal Zone funds was being exacted of, and given by, banks; Annual Reports of the Isthmian Canal Commission made to it for the years 1913 to 1916, inclusive; and also by reports made to it by Congressional Committees on proposed legislation for the Canal Zone.

For a further and separate defense to the alleged cause of action set forth in said paragraph 7, these defendants say that the plaintiff ought not to have and maintain this suit, for the following reasons:

1. The said deposits made in the District National Bank were of monies of the United States so deposited by agents of the United States; that the said securities were pledged to insure said deposits and were given and received for the United States; the sale thereof and the deposit of the proceeds in the Hamilton
27 National Bank was for and on behalf of the United States and the credit thereby established is a credit of and for the United States; that any decree or judgment against these defendants would affect materially the United States in respect of its resources and assets; that the United States is, therefore, the real party in interest as a defendant and an indispensable party to this suit in whose absence the Court ought not to proceed.

2. The plaintiff has a plain and adequate remedy at law against the United States in the United States Court of Claims for the amount claimed.

8. Defendant H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, answering said paragraph numbered 8, avers that he has no knowledge or information of, or interest in, or concern respecting the matters and things alleged therein, and that no cause of action against him is set forth in said paragraph.

Defendants Harry H. Woodring, Secretary of War, Creed Fulton Cox, Chief of Bureau of Insular Affairs, War Department, and C. F. Brown, Disbursing Agent Philippine Revenue, Bureau of Insular Officers, War Department, answering said paragraph, admit the allegations of fact contained in the subparagraphs one, two and three of said paragraph 8 except the allegation contained in subparagraph two that the Secretary of War, through and by the then Chief of the Bureau of Insular Affairs, held, as pledgee, the assets referred to, which allegation defendants deny and on the contrary aver that the pledgee was the Government of the Philippine Islands; further, they deny that the pledging of security for the deposit account specified, by the District National Bank was without authority of law as alleged in subparagraph two.

Said defendants aver that the allegations contained in subparagraph four of said paragraph 8 are conclusions of law to which
28 they are not required to make answer; nevertheless, they deny said allegations, and specifically deny that there was no authority for giving the said pledge by the said District National Bank; deny that the assets received by the then Secretary of War or his subordinates were subject to any trust in favor of the said bank or its depositors or creditors or are now so held and deny that they or any of them are accountable therefor. Further and particularly

answering that allegation of said subparagraph relative to the alleged erroneous payment by the then Conservator of the said District National Bank of the sum of \$25,000 to the Government of the Philippine Island, these defendants aver that if, as alleged in said subparagraph, the said payment was made "under mistake of law," there can be no recovery in respect thereto.

Answering subparagraph 5 of said paragraph 8, defendants admit allegations as to the official status of defendant C. F. Brown; as to the power of the Court asserted in said subparagraph, these defendants submit that no answer is required of them.

8 (a). These defendants admit that the proceeds of the sale of the bonds, described in paragraph 8, were transmitted to and placed with the Chase National Bank of the City of New York as alleged in paragraph 8 (a) of the amended bill of complaint. Defendants are without knowledge or information sufficient to form a belief as to whether, as alleged in said paragraph numbered 8 (a), said proceeds or any part thereof were transmitted to defendant Henry Morgenthau, Jr., and therefore deny the allegation to that effect and demand strict proof thereof, if the same be material. Defendants further deny that the monies deposited with defendant Morgenthau, Jr., were or are funds of the plaintiff herein and deny that said Morgenthau, Jr., received and holds the same in trust for plaintiff; on the

29 contrary, these defendants aver that said proceeds and the amount of said payment were and are monies of the government of the Philippine Islands and were deposited with the said Chase National Bank to the credit of the Treasurer of the Philippine Islands; that said bank had been designated as a branch of the Philippine Insular Treasury and as a depositary of the government of the Philippine Islands.

Further, defendants aver that the monies alleged to have been transmitted by the said Chase National Bank and held by and in the custody of defendant Henry Morgenthau, Jr., are monies of the Government of the Philippine Islands and are held by him as Secretary of the Treasury under the authority of the Act of June 11, 1934, 48 Stat. 929.

Further answering said amended bill of complaint, defendants aver that section 625 of the Revised Administrative Code of 1917 of the Philippine Islands was and is authority for the requirement of security to insure deposits of funds of the Philippine Government and constituted ample authority for the giving of the security herein involved by the District National Bank and the receipt of it by the then Secretary of War. That said section 625 is as follows:

"The Governor-General may appoint any bank or banking institution in the Philippine Islands, and the Secretary of War any similar institution in the United States, as a depositary of the Government of the Philippine Islands, after such institution has filed sufficient evidence of its sound financial condition and has deposited, as security, either in the Insular Treasury or in the Bureau of Insular Affairs, at Washington, bonds of the United States or of the Government of the Philippine Islands or other bonds or securities satisfactory to and approved by the officer making the appointment and in such amount as shall be required by him."

That the enactment of said section was reported to the Congress of the United States, pursuant to the requirement of section 19 of the Act of Congress of August 29, 1916, Ch. 416, 39 Stat. 551, which provides that:

30 "All laws enacted by the Philippine Legislature shall be reported to the Congress of the United States, which reserves the power and authority to annul the same."

That Congress did not annul said enactment and thus tacitly approved the same.

That substantially similar provisions to those contained in said section 625 were contained in an enactment of the Philippine Commission of October 12, 1907 (Section 596, Compilation of Acts of the Philippine Commission). These two provisions were expressly recognized and continued in force and effect by section 6 of the said Act of August 29, 1916, 48 U. S. Code, 1004.

Further answering said amended bill of complaint, said defendants aver that the giving of the said bond by the District National Bank, a copy of which is made Exhibit "C" to the bill of complaint herein and made a part of this answer by reference, and the deposit of the securities was in accordance with a practice and custom in respect of funds of the Philippine government which has existed and continued since the year 1908; that during said period, the various Secretaries of War, acting under the provisions of said section 596 enacted October 12, 1907 and said section 625, of the Revised Administrative Code, have from time to time designated certain state and national banks within the continental limits of the United States as depositaries for funds of the Philippine Government and people, the several Governors-General of the Philippine Islands have designated the same banks as branches of the insular Treasury, and the Treasurers of the Philippine Islands have placed and kept on deposit therein large amounts of the public funds of the People of the Philippine Islands, for the purpose of maintaining the parity of Philippine bonds, notes, coinage and currency; that the total amount of such deposits in the United States formerly approximated \$63,000,000 and these deposits were formerly distributed among 39 national banks and 18 state banks.

That each depositary bank was required to deposit, and deposited with or to the order of the Chief of the Bureau of Insular Affairs, War Department, collateral security of a value equivalent to the amount of the deposit, in each instance under a formal pledge agreement in writing authorizing recourse by the pledgee to the pledged collateral in the event of a failure to repay the amount of the deposit; that such custom and practice were recognized, well-known, acted upon and continued without objection, question or challenge for about twenty-five years and until after the closing of the District National Bank; that such custom and practice were also known to the respective Comptrollers of the Currency during the said period since its adoption and up to and subsequent to the sale of the said securities; that no objection thereto was ever raised or made by any of the said Comptrollers and said practice and custom aforesaid were recognized and received and had the approval and sanction of said officials.

Further, that the Comptroller of the Currency was also aware of and was consulted with, concerning the proposed sale of the said

securities here involved and took no action to prevent it but sanctioned and approved the said sale; that the plaintiff's predecessor, as receiver of the said District National Bank, interposed no objection to said sale and acquiesced therein, after being authorized so to do by the Comptroller of the Currency.

Said defendants further aver that said practice and custom of requiring and receiving security has obtained for many years in respect of deposits of other funds which were under the control of or administered by other departments or agencies, or officers of the United States, or with respect to which such departments, agencies or officers had or performed any duties or functions and such practice and custom continued without objection or question until after the closing of the various banks in which such funds were deposited.

Further answering said amended bill of complaint, these defendants aver that they had no part or participation, either officially or personally in the transactions complained of in said bill; that defendants Woodring and Brown had at no time and do not now have any authority, control or supervision over, or functions in respect of, the said funds deposited in the said Chase National Bank and which it is alleged were in whole or in part transferred and placed in the custody of defendant Henry Morgenthau, Jr.; that defendant Cox, as Chief of the Bureau of Insular Affairs of the War Department, in respect of moneys in the Chase National Bank to the credit of the Treasurer of the Philippine Islands has authority to order the transfer thereof to the United States Treasury or to the Philippine National Bank of New York city, in respect of deposits of moneys made under the said Act of June 11, 1934 (48 Stat. 929) in the United States Treasury and which are deposited to the credit of the Treasurer of the Philippine Islands, said defendant has authority to order the transfer thereof to the said Chase National Bank; except as herein specified, said defendant Cox has no authority, control or supervision over such monies, funds or deposits.

For a further and separate defense, the said defendants say that the plaintiff ought not to have and maintain his suit for the following reasons:

1. The funds sought to be recovered are funds of the Government of the Philippine Islands, and the bond given and the pledge of securities made to insure the deposits made in the District National Bank were given and made to the Government of the Philippine Islands, which is the real party in interest herein.

2. The suit in respect of the asserted cause of action affecting these defendants is, in essence, one against the Government of the Philippine Islands, which has not consented to be sued herein.

3. The Government of the Philippine Islands is an indispensable party to this suit, one whose interests are involved and vitally affected by this suit, and in whose absence the Court ought not to proceed.

4. The amended bill of complaint states no cause of action against these defendants or any of them cognizable in equity and sets forth no facts warranting the relief sought against them or any of them.

5. The plaintiff is not entitled to any recovery or relief against these defendants or any of them, since his predecessor as conservator or receiver consented to and acquiesced in the sale of the securities

and voluntarily made the payment set forth in subparagraph 4 of paragraph 8 of the amended bill of complaint; by reason of which plaintiff is estopped from suing or recovering.

6. The plaintiff is not entitled to any recovery or relief against the defendants because of the doctrine in *pari delicto*, *potior est conditio defendentis*.

7. The plaintiff is not entitled to any relief or recovery against defendant Harry H. Woodring because he is not properly a party hereto, there being no authority for his substitution as a party defendant in place of George H. Dern, deceased, since the statute under which substitution was granted does not apply to or cover a case such as that presented by the amended bill of complaint.

9. Answering paragraph numbered 9, defendants Harry H. Woodring and H. A. A. Smith admit that the funds and money
34 referred to in paragraph numbered 7, to wit, the so-called Panama Canal funds, are not public funds and are not part of the revenue of the United States; that they are not subject to the control of the Secretary of the Treasury in his official capacity as such Secretary in respect of public moneys of the United States; but in this connection they aver that the interest accruing on said moneys is part of the revenues of the United States; and further that in respect of such of said moneys as were derived from the issuance of Postal Money Orders, they are funds for the payment of which the United States is responsible and obligated.

Said defendants deny that said moneys are not moneys of the Panama Canal, as alleged in said paragraph and on the contrary aver that they are moneys of the said Panama Canal. These defendants admit that the District National Bank was never designated by the Secretary of the Treasury as depository of the Government of the Canal Zone, but say that the Secretary of the Treasury did approve of the depositing in the said District National Bank of moneys of the Panama Canal. Said defendants admit that the Secretary of the Treasury did not exact of the said Bank, the pledge of the securities given to insure the deposits of the Panama Canal funds but they aver that the Secretary of the Treasury was consulted by the Secretary of War in respect of the latter's proposal to require securities for said deposits and approved the same.

Defendant H. A. A. Smith is without knowledge or information concerning the other allegations of fact contained in said paragraph 9 and, therefore, denies them.

Defendants Harry H. Woodring, Creed Fulton Cox, and C. F. Brown, answering in respect of the moneys specified in paragraphs 8 and 8 (a), to wit, the moneys involved in the transactions of
35 the Government of the Philippine Islands, admit that said moneys are not moneys of the United States and are not subject to the control of the Secretary of the Treasury in his official capacity in respect of moneys of the United States; they aver, however, that said moneys are moneys of the Government of the Philippine Islands and that said moneys are deposited with the Secretary of the Treasury as moneys of the Government of the Philippine Islands pursuant to the Act of June 11, 1934, and are held in the Treasury of the United States to the credit and for the account of the Treasurer of the

Philippine Islands and are claimed by said government as a part of its public moneys.

Said defendants admit that the said District National Bank was never designated by the Secretary of the Treasury to receive deposits of the Government of the Philippine Islands and that the Secretary of the Treasury never exacted from said bank the pledge of the securities to secure deposits of the Government of the Philippine Islands; but these defendants aver that the Comptroller of the Currency, a subordinate of the Secretary of the Treasury, knew of said deposits made in said Bank by and on behalf of the Government of the Philippine Islands and that securities to insure the same had been exacted from said Bank and acquiesced in said transactions.

As to the other allegations of fact contained in said paragraph, defendants Creed Fulton Cox and C. F. Brown are without knowledge or information and, therefore, deny the same.

36 WHEREFORE, having made full answer, all these defendants pray that the said amended bill of complaint be dismissed as to them with costs against the plaintiff.

HARRY H. WOODRING,
Secretary of War.

By MALIN CRAIG,
Acting Secretary of War.
CREED FULTON COX,
*Chief of Bureau of Insular
Affairs, War Department.*

C. F. BROWN,
*Disbursing Agent, Philippine Revenue,
Bureau of Insular Affairs, War Department.*

H. A. A. SMITH,
*Chief of Office and General Purchasing
Officer, Panama Canal.*

LESLIE C. GARNETT,
United States Attorney.

H. L. UNDERWOOD,
Assistant United States Attorney.

E. M. CAFFEY,
Captain, Judge Advocate General's Office, War Department.
Attorneys for defendants.

DISTRICT OF COLUMBIA, ss:

Malin Craig, being first duly sworn, deposes and says that he is Acting Secretary of War of the United States, and as such has subscribed to the foregoing answer made on behalf of Harry H. Woodring, Secretary of War, one of the defendants in the above-entitled cause; that he has subscribed to said answer and makes this affidavit and verification on behalf of said defendant, because of the absence of the latter from the District of Columbia; that he has read the foregoing answer by him so subscribed and knows the contents thereof, and that the facts therein stated he verily believes to be true.

MALIN CRAIG.

Subscribed and sworn to before me this 30th day of October 1936.

[SEAL]

HERBERT F. STATESIR,
Notary Public, D. C.

My Commission Expires Feb. 1, 1941.

37 DISTRICT OF COLUMBIA, ss:

Creed Fulton Cox, being first duly sworn, deposes and says that he is Chief of Bureau of Insular Affairs, War Department, and as such, named one of the defendants in the above-entitled cause; that he has read the foregoing answer by him subscribed and verily believes the facts stated therein to be true.

CREED FULTON COX.

Subscribed and sworn to before me this 29th day of October, 1936.

[SEAL]

ALFRED H. MORI.
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

C. F. Brown, being first duly sworn, deposes and says that he is Disbursing Agent, Philippine Revenue, Bureau of Insular Affairs, War Department, and as such, named one of the defendants in the above-entitled cause; that he has read the foregoing answer by him subscribed and verily believes the facts stated therein to be true.

C. F. BROWN.

Subscribed and sworn to before me this 29th day of October, 1936.

[SEAL]

ALFRED H. MORI.
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

H. A. A. Smith, being first duly sworn, deposes and says that he is Chief of Office and General Purchasing Officer, Panama Canal, and as such, named one of the defendants in the above-entitled cause; that he has read the foregoing answer by him subscribed and verily believes the facts stated therein to be true.

H. A. A. SMITH.

Subscribed and sworn to before me this 29th day of October, 1936.

[SEAL]

FLOYD B. HEIMER,
*Notary Public, D. C.*38 *Motion to strike paragraph 7 and defenses 1 and 2 in answer, etc.*

Filed March 22, 1937

* * * * *

Comes now Justus S. Wardell, Receiver of the District National Bank of Washington, plaintiff herein by his attorneys and moves the Court to strike Paragraph 7 and defenses 1 and 2 set forth in the answer of defendants Harry H. Woodring, Secretary of War and H. A. A. Smith, Chief of Office and General Purchasing Officer of Panama Canal, and for the entry of a decree pro confesso for the plaintiff against said defendants, and for reasons therefor states as follows:

1. The said answer does not set up any defenses to the cause of action alleged in plaintiff's amended bill of complaint, and plaintiff is entitled to have said Paragraph 7 and said defenses 1 and 2 stricken, and is entitled to a decree pro confesso against said defendants upon the averments of plaintiff's amended bill of complaint.

2. The pledge of the assets of the District National Bank to secure deposits of the government of the Canal Zone was unauthorized in law, ultra vires the bank, and void; and such pledge constituted an illegal and preferential disposition of the assets of the bank, and the Receiver may recover either the pledged securities or their proceeds without restitution by payment in full of the credit balance on deposits in the bank at suspension.

3. And for the additional reasons and principals of law set forth in the attached memorandum of Points and Authorities in support of this Motion.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for Plaintiff.

39

Memorandum of Court

Filed July 14, 1937

* * * * *

Motion to strike answers of Defendants Woodring and Smith—sustained.

LUHRING, J.

40

Order sustaining motion to strike, etc.

Filed August 23, 1937

* * * * *

This cause having come on for hearing at this term of Court upon the plaintiff's motion to strike paragraph 7 and defenses 1 and 2 of the answer filed by defendants herein and for a decree pro confesso against said defendants, and it appearing to the satisfaction of the Court that said motion should be granted, it is by the Court this 18th day of August, A. D. 1937,

ADJUDGED, ORDERED AND DECREED, that the motion of plaintiff to strike paragraph 7 and separate defenses 1 and 2 of the answer of Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer of Panama Canal, and for a decree pro confesso against said defendants be and said motion is hereby granted; and, the said defendants, Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer of Panama Canal, having elected to stand on their respective answers as filed and having stipulated that a final decree be entered at this time, it is further

ADJUDGED, ORDERED AND DECREED, that the defendants, Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer of Panama Canal, be and they are hereby ordered and directed to pay over to the plaintiff herein the sum of \$207,361.41, with interest at the legal rate from September 24, 1933 to September 25, 1933, as of which date a credit and offset of 50% dividend on defendants' provable claims in the sum of \$207,361.41 amounting to \$103,680.70 is hereby awarded and credited, and thereafter the balance of said judgment amounting to \$103,680.71 will be

41 subject to and will carry interest at the legal rate from September 25, 1933 to December 7, 1936, on which date a credit and offset of 25% dividend on defendants' provable general claim in the sum of \$207,361.41 amounting to \$51,840.35 is hereby awarded and credited, and thereafter the balance of said judgment amounting to \$51,840.36 will be subject to and will carry interest at the legal rate from December 7, 1936 until paid; and it is further

ADJUDGED, ORDERED AND DECREED, that the defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office and General Purchasing Officer of Panama Canal, are entitled to file a claim against the Receiver of the District National Bank of Washington and to receive such further dividends thereon as are paid to unsecured depositors and other general creditors of said bank; and it is further

ADJUDGED, ORDERED AND DECREED, that execution may issue against the defendants upon the judgment herein awarded.

O. R. LUHRING, *Justice*.

The defendants, by their attorneys, object and except to the entry of the above order and decree of the Court, which objection and exception is hereby allowed by the Court, and an appeal is noted in open court to the United States Court of Appeals for the District of Columbia which appeal is hereby allowed by the Court.

O. R. LUHRING, *Justice*.

No objection to the form. The defendants consent to the entry of a final decree herein in place of a decree pro confesso.

H. L. UNDERWOOD,
Assistant United States Attorney.

42 *Assignment of errors of Defendants Woodring and Smith*

Filed September 1, 1937

* * * * *

(1) The Court erred in holding and determining that there was no authority for the pledging by the District National Bank of the securities involved to safeguard the deposits of the funds of the Panama Canal and in not holding and determining that such authority existed.

(2) The Court erred in not holding and determining that the giving of the securities by the District National Bank was warranted by custom and usage long established, well recognized and unquestioned for many years, and also sanctioned by the Secretary of the Treasury and the Comptroller of the Currency.

(3) The Court erred in not holding and determining that the plaintiff was estopped from bringing and maintaining this suit by the action of his predecessor, the Conservator of the said bank, approved by the Comptroller of the Currency, in agreeing to the sale of the securities and the setting up in the Hamilton National Bank of the credit account in the name of the Secretary of War.

(4) The Court erred in not holding and determining that the United States is an indispensable party to this suit insofar as the funds of the Panama Canal are concerned.

(5) The Court erred in not holding and determining that the answer of these defendants constituted a complete defense to the suit against them; and in not overruling plaintiff's motion to strike and for a decree pro confesso.

(6) The Court erred in sustaining the plaintiff's motion to strike and for a decree pro confesso.

43 (7) The Court erred in entering a decree against these defendants.

LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for said defendants.

Service of a copy hereof is hereby acknowledged this 1st day of September 1937.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for Plaintiff.

Designation of record

Filed September 1, 1937

* * * * *

The Clerk will please prepare the record on appeal herein, including therein the following:

(1) Amended Bill of Complaint with Exhibits "A" and "B."

(2) Answer of defendants Harry H. Woodring, Secretary of War, and H. A. A. Smith, Chief of Office, Panama Canal, to Amended Bill of Complaint.

(3) Motion of plaintiff to strike portions of the answer of these defendants and for a decree pro confesso.

(4) Memorandum of Court sustaining motion.

(5) Final decree against these defendants.

(6) Notation of appeal.

(7) Assignment of Error.

44 (8) This designation.

LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for defendants Harry H. Woodring, Secretary
of War, and H. A. A. Smith, Chief of Office, Panama Canal.

Service of a copy of this Designation is hereby acknowledged this 1st day of September, 1937.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, CHARLES E. STEWART, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 44, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59007 in Equity, wherein Norman R. Hamilton, Receiver, District National Bank of Washington, a Corporation, is Plaintiff, and George H. Dern, Secretary of War, et al., are Defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District this 22nd day of October, 1937.

[SEAL]

C. E. STEWART, *Clerk.*

No. 7055. Woodring, Sec'y. of War, et al., Appellants, vs. Wardell, Receiver. United States Court of Appeals for the District of Columbia. Filed Oct. 26, 1937. Moncure Burke, Clerk.

No. 7055

**In the United States Court of Appeals
for the District of Columbia**

OCTOBER TERM, 1937

HARRY H. WOODRING, SECRETARY OF WAR, AND H.
A. A. SMITH, GENERAL PURCHASING OFFICER AND
CHIEF OF WASHINGTON OFFICE, PANAMA CANAL,
APPELLANTS

v.

JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL
BANK OF WASHINGTON, D. C.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

DAVID A. PINE,

Acting United States Attorney.

H. L. UNDERWOOD,

Assistant United States Attorney.

LESLIE C. GARNETT,

Special Assistant to the Attorney General,

Of Counsel.

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**In the United States Court of Appeals
for the District of Columbia**

OCTOBER TERM, 1937

No. 7055

HARRY H. WOODRING, SECRETARY OF WAR, AND H.
A. A. SMITH, GENERAL PURCHASING OFFICER AND
CHIEF OF WASHINGTON OFFICE, PANAMA CANAL,
APPELLANTS

v.

JUSTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL
BANK OF WASHINGTON, D. C.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLANTS

This appeal is from a decree (R. 23, 24) granting a motion of plaintiff below, appellee here, to strike out the substantial part of appellants' answer to plaintiff's amended bill and for a decree *pro confesso* against appellants (the defendants below), and directing the payment of an amount representing the proceeds of certain assets of the District National Bank of Washington, D. C., which had

been pledged by the Bank to secure deposits in the Bank of moneys designated as "Canal Zone Funds."¹

THE FACTS

On August 18, 1914, the then Secretary of War opened two deposit accounts in the District National Bank, one designated "Secretary of War, Canal Zone Funds, Call Account," the other "Secretary of War, Canal Zone Funds, Checking Account" (Amended Bill of Complaint, par. 7, R. 2, 3). These deposits were made pursuant to a contract of the same date, entered into between the then Secretary of War and the Bank. A copy of that contract is made Exhibit "A" to the amended Bill (R. 8-11).

In that contract the Secretary of War was identified as "the executive officer of the United States charged by the President with the supervision and control over the governmental affairs of the Canal Zone." It recites that the Secretary "desires to secure a safe and sure place for the deposit, custody, safe-keeping, and disbursement of" funds which have been and will be collected and received by the administrative officers of the Canal Zone; that the Bank guarantees that it has a suitable, safe, and convenient place therefor and is prepared to undertake the custody and safe-keeping of and

¹ The appellants (defendants below) elected to stand on their answer and stipulated that a final decree might be entered instead of a *pro confesso* (R. 23).

accounting for said moneys and funds. It was agreed that upon the execution of the contract and the deposit with the General Purchasing Officer of the Panama Canal of bonds as security therefor, there would be deposited with the Bank such part of the said moneys and funds as may be found convenient and necessary (Article I). The Bank "in consideration of the benefits it will derive from being made such place of deposit, the mutual entering into of the agreement herein set forth, and the deposit with it of such moneys and funds, undertakes and agrees to receive and safely keep and disburse and properly account for all moneys and funds deposited with and turned over to it by the Collector of the Panama Canal, or by other agents, or representatives of the Secretary of War" (Article II).

"As security for the safe-keeping and prompt payment of the moneys and funds deposited under this agreement and the faithful performance thereof, the Bank shall deposit with * * * General Purchasing Officer of the Panama Canal, bonds of the acceptable value of a sum not less at any times than the amount of moneys and funds deposited under this agreement." These bonds were to be deposited in the vaults of the American Security and Trust Company (Article VIII).

The Bank further agreed that in the event it failed to make prompt payment or to safely keep the moneys and funds deposited with it, or other-

wise failed to faithfully perform all the provisions of the agreement, "the said bonds shall become the property of the Secretary of War and may be either retained by him or may be sold, transferred, and conveyed * * * by the said Secretary of War, or his duly authorized agent, as his absolute property, and the proceeds realized from the said sale or sales shall be applied * * * to the liquidation of any amount due by the Bank under this agreement" (Article IX).

Under this agreement and upon the opening of the two accounts specified, the Bank deposited securities. On March 5, 1933, the Bank was closed by Proclamation of the President of the United States. It never reopened and was found and determined to be insolvent by the Comptroller of the Currency, who appointed a Conservator on March 14, 1933, and later, November 6, 1933, a Receiver who brought this suit.

At the time of the suspension of the Bank, the credit balance in the "Call Account" amounted to \$200,000.00 and that in the "Checking Account" amounted to \$14,739.80. The par value of the securities deposited to insure these deposits was at that time \$274,200.00. (Bill, par. 7, R. 2, 3; Ans. par. 7, R. 13).

After the closing of the Bank, the securities pledged were sold to the Hamilton National Bank of Washington under an agreement by the Secretary of War and the General Purchasing Officer,

with the then Conservator of the District Bank, whereby the Secretary of War was paid from the proceeds of said sale \$214,739.80, representing the credit balances on the two deposits, and \$3,535.37, representing interest on said deposits. These payments were made by the setting up of a new deposit account in the Hamilton National. (Bill, p. 7, R. 3; Ans. par. 7, R. 13.) The Comptroller of the Currency was aware of the proposed sale and sanctioned and approved it (Ans. par. 7, R. 15, 16).

THE LEGAL PREDICATE OF THE AMENDED BILL

The theory upon which the suit is brought is that there was no authority for the pledge of the securities by the Bank or for the receiving of the securities by the Secretary of War; that the payments to the Secretary from the proceeds of the sale of the securities was illegal, was made under a mistake of law, and that such proceeds were and are a trust fund for the benefit of the depositors, creditors, and stockholders of the Bank and as such are recoverable from these defendants. (Bill, par. 7, R. 3, 4.)

THE DEFENDANTS' ANSWER

The answer denies that the pledge and deposit of the securities was without authority of law; denies that the Secretary was without authority to receive and accept the securities and denies that said securities or the proceeds paid to them were or are held in trust and are recoverable. It averred that the making of the contract for the deposit and de-

livery of the securities was within the authority and power of the Secretary of War, conferred upon him by Acts of Congress and by regulations promulgated pursuant to statutory authority; that the securities pledged were lawfully in the possession of the Secretary of War and that the sale of the securities and the payment of the proceeds was in all respects regular and lawful. (Ans. par. 7, R. 13.)

It was further alleged that the deposits for which the securities were pledged consisted almost entirely of moneys received by the Postal Service of the Canal Zone as deposit money order funds (equivalent to postal savings funds in the United States), and money order funds.

The answer then sets up in some detail the Statutes and regulations from which the power and authority of the Secretary are adduced (R. 14, 15).

Further, it was asserted that the action of the Secretary in negotiating for the giving of security to safeguard the deposits and of entering into the contract was the subject of correspondence between the Secretary of War and the Treasury Department and was approved by the Treasury and that the entering into the contract with the District National Bank was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury (Ans. par. 7, R. 15).

That requiring and giving security was in accordance with a practice and custom adopted and

acted upon in respect of other deposits of Canal Zone funds and in respect of other deposits of funds under the control of or administered by other departments or agencies of the United States and which had continued without objection or challenge for more than twenty years and until after the closing of the various banks in which such funds were deposited; that such custom and practice were known to the Comptrollers of the Currency during said period and were recognized and approved by them. Moreover, that in the case at bar the Comptroller was aware of the proposed sale of the securities, made no objection to it but sanctioned and approved it (R. 15, 16).

It is also averred that Congress was informed of the taking of security for deposits of Canal Zone funds by annual reports made by the Commission to it and by reports made to Committees of Congress dealing with legislation for the Canal Zone (R. 16).

For separate defenses, it is asserted (R. 16):

1. That the United States is an indispensable party to the suit, one in whose absence the Court ought not to proceed.
2. The plaintiff has an adequate remedy at law in the Court of Claims.

THE MOTION TO STRIKE

The motion which the Court granted was to strike out paragraph 7 of the answer, which con-

tains the defenses set forth above, and the affirmative, separate defenses just enumerated; a decree *pro confesso* was also asked.² (R. 22.)

THE ASSIGNMENT OF ERRORS

The errors assigned in support of the appeal are (R. 24, 25)—

(1) The Court erred in holding and determining that there was no authority for the pledging by the District National Bank of the securities involved to safeguard the deposits of the funds of the Panama Canal and in not holding and determining that such authority existed.

(2) The Court erred in not holding and determining that the giving of the securities by the District National Bank was warranted by custom and usage long established, well recognized and unquestioned for many years, and also sanctioned by the Secretary of the Treasury and the Comptroller of the Currency.

(3) The Court erred in not holding and determining that the plaintiff was estopped from bringing and maintaining this suit by the action of his predecessor, the Conservator of the said bank, approved by the Comptroller of the Currency, in agreeing to the

² The bill of complaint included a claim on similar grounds for recovery of proceeds of the sale of securities pledged by the bank for deposits of funds of the Government of the Philippine Islands (Par. 8 of amended bill). This claim is not included in this appeal but is still pending in the District Court.

sale of the securities and the setting up in the Hamilton National Bank of the credit account in the name of the Secretary of War.

(4) The Court erred in not holding and determining that the United States is an indispensable party to this suit insofar as the funds of the Panama Canal are concerned.

(5) The Court erred in not holding and determining that the answer of these defendants constituted a complete defense to the suit against them; and in not overruling plaintiff's motion to strike and for a decree pro confesso.

(6) The Court erred in sustaining the plaintiff's motion to strike and for a decree pro confesso.

(7) The Court erred in entering a decree against these defendants.

THE STATUTES INVOLVED

The statutes pertinent in the consideration of this appeal are set forth in the appendix, pages 47-54.

SUMMARY OF THE ARGUMENT

1. There was full authority for the pledging of the securities for the safe-guarding of the deposits.

2. The giving of security for Canal Zone deposits was recommended, sanctioned, and approved by the Secretary of the Treasury and the Comptroller of the Currency.

3. The practice of pledging securities to safe-guard deposits made by government officers and agencies has existed undisturbed and unquestioned

for many years, thus establishing a custom or usage. It was known to Congress.

4. The Receiver is estopped to maintain this suit because the Comptroller of the Currency and the Conservator of the District National Bank approved, agreed to, and sanctioned the sale of the securities. Even if they acted under a mistake of law, a recovery cannot be had.

5. The United States is an indispensable party to this suit.

ARGUMENT

I

There was full authority for the pledging of the securities to insure the deposits of Canal Zone funds

The plaintiff's bill is premised upon the proposition that in the absence of statutory authority, national banks lack authority for a pledge such as that under consideration here. Reliance is put on the decisions in *Texas & Pacific Ry. Co. v. Pottorff*, 291 U. S. 245, *City of Marion v. Sneed*, id. 262, and *O'Connor v. Rhodes*, 65 App. D. C. 21.

But, the question presented here is whether there was authority, in this instance, for the pledging, for the answer of appellants asserted that there was and set up the basis for that claim, namely, the laws, executive orders, and regulations affecting the Canal Zone by virtue of which authority to exact a pledge for funds such as these, was granted or conferred (R. 14 and 15).

Now, if a government officer or agency is given the power to require security or is authorized to

thus safeguard deposits in national banks, that is authority for the banks to give it. *Texas & Pacific Ry. Co. v. Pottorff*, *supra*, p. 257, 258 and notes 11 and 12; *O'Connor v. Rhodes*, *supra*.

We, therefore, proceed to a consideration of the Acts of Congress, Executive orders, and regulations affecting the Canal Zone, which we rely upon to show authority for the execution of the pledge.

It appears that the deposits of Canal Zone funds in the District National Bank at the time it closed were composed almost entirely of moneys received by the Postal Service of the Canal Zone, viz: deposit money order funds and money order funds (Ans. R. 14).

The Act of June 28, 1902, c. 1302, 32 Stat. 481, Appendix, p. 47, authorized the President to acquire for the United States from the Republic of Colombia, perpetual control of a strip of land not less than six miles wide, extending from the Caribbean Sea to the Pacific Ocean, which control was to include jurisdiction over said strip and the ports at the ends thereof to make such police and sanitary rules and regulations as shall be necessary to preserve order and preserve the public health thereon, and to establish such judicial tribunals as may be agreed upon thereon as may be necessary to enforce such rules and regulations. (Sec. 2.)

Section 7 of the Act created the Isthmian Canal Commission "to enable the President to construct the canal and works appurtenant thereto," declared that Commission should in all matters be

subject to the direction and control of the President and should make reports to the President of all "their actings and doings," which reports should be transmitted by the President to Congress.

The Act of April 28, 1904, c. 1758, 33 Stat. 429, Appendix, p. 49, authorized the President to take possession of the ten mile strip "hereinafter referred to as 'the Canal Zone,' " acquired from the Republic of Panama under treaty. Section 2 provided:

That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion.³

³ The fifty-eighth Congress ended March 1905, and no legislation relating to the Canal Zone was enacted until the second session of the Sixty-second Congress. That legislation will be considered hereinafter, but first we deem it advisable to set forth other regulations and orders issued in the interim.

Under the authority thus vested in the President he, by letter of May 9, 1904, to the Secretary of War, directed that all the work of construction of the Canal and "all the governmental power in and over said Canal Zone and its appurtenant territory, which by virtue of the Act of Congress approved April 28, 1904, and these instructions, shall be vested in said Isthmian Canal Commission, shall be carried on or exercised under your supervision and direction as Secretary of War."

By that same letter, the President authorized the said Commission to make all needful rules and regulations for the government of the Zone and for the correct administration of the military, civil, and judicial affairs of its possessions until the close of the fifty-eighth Congress. It was also therein authorized to "legislate on all rightful subjects of legislation not inconsistent with the laws and treaties of the United States * * *." That power was also to "include the power to raise and appropriate revenues in said Zone, and all taxes, judicial fines, customs duties, and other revenues," levied under the authority of the Commission shall be retained, accounted for, and disbursed by said Commission for its proper purposes.

Further, all laws, rules, and regulations of a governmental character enacted by the Commission were directed to be submitted to the Secretary of War for approval and "should your approval be withheld * * * then from that time the law,

rule, or regulation shall thereafter have no force or effect."

On June 24, 1904, the Secretary of War directed the establishment of a postal service in the Canal Zone and instructed the Governor of the Canal Zone to formulate a plan for such service which should include such provisions of the postal service of the United States as were not inapplicable to the conditions of law and fact existing in the Canal Zone. The plan was to be submitted to the Isthmian Canal Commission for its action.

That Commission enacted, September 2, 1904, Act No. 8, which in section 42 established a postal service to be conducted, regulated, and controlled by such of the laws, rules, and regulations of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Zone, and the laws enacted and the rules and regulations adopted by the Commission.

The money order system of the Canal Zone was established pursuant to a resolution of the Commission of May 2, 1906.

After the creation of the Postal Savings System for the United States by the Act of June 25, 1910, 36 Stat. 814, 39 U. S. Code 751 et seq., the President by Executive Order of September 8, 1911, established a postal savings system for the Canal Zone.

By Executive Order of September 5, 1914, it was provided that money orders might be issued "for

the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone.”

Thus, money orders issued for deposits were designated *deposit* money orders.⁴ It is important to observe that about 75 per cent of the funds deposited in the District National Bank, which are here involved, consisted of moneys represented by such deposit money orders. About 25 per cent consisted of moneys received for money orders.

Now, the Postal Savings Act for the United States specifically requires the Board of Trustees of that System to deposit postal savings funds in banks and that the Board “shall take from such banks * * * security * * * to insure the safety and prompt payment of such deposits.” (39 U. S. Code, Sec. 759, Appendix, p. 54.)

Since the order establishing the postal service of the Canal Zone made applicable the provisions of the postal service of the United States, which were not inapplicable to the conditions of law and fact existing in the Canal Zone, it is clear that the provisions of the Postal Savings Act insofar as the requirement of security for deposits was concerned thus became applicable to Canal Zone funds derived from *deposit* money orders.

Although the terms of the Act of April 28, 1904, *supra*, had seemingly limited authority for the gov-

⁴ Deposit money orders were recognized by the Act of August 21, 1916, 39 Stat. 528, Sec. 6, and September 21, 1922, 42 Stat. 1008, Sec. 11, now 48 U. S. Code 1324, which provided for payment of interest thereon. Appendix, p. 52.

erning of the Canal Zone, yet a period of more than eight years elapsed before any further Congressional action was taken. Naturally, questions arose as to the legal situation.

In an opinion dated January 30, 1907, 26 *Op. A. G.* 113, the Attorney General considered a question asked by the Secretary of War as to whether by Section 2 of the Act of April 28, 1904, the President, as distinguished from the Isthmian Canal Commission was prohibited from putting into effect by Executive Order needed rules and regulations for the Canal Zone and whether he had lost the power to modify rules and regulations of the Commission established prior to the expiration of the Fifty-eighth Congress.

The Attorney General held that under the Treaty with Panama, it became the duty of the United States to provide a government for the territory acquired and that (p. 116, 117)—

in the absence of any provision by Congress to effect this object, the President would be authorized and obliged by his duty as executive head of the nation under the Constitution to discharge the obligation thus resting upon the nation; and if Congress had taken no action whatever on the subject, the right of the President to thus administer the territory controlled by the nation would not be open to question. In fact, however, Congress, by the first section of the act above quoted, authorized the President 'to take possession of and occupy on behalf of the

United States' the territory generally known as the Canal Zone, and covered by the terms of the treaty. This authority to take possession of and occupy would, of itself, imply the authority to govern in so far as government was needful to secure the safety and welfare of the inhabitants of the territory occupied, whether such inhabitants dwelt there at the time of its cession or came there for lawful purposes, and with the consent of the United States afterwards.

Discussing the provision of the 1904 act, containing the provision which seemed to limit authority to the expiration of that Congress, the Attorney General said (p. 117):

In my opinion this provision is to be considered as declaratory only of what would have been the rights and duties of the President if it had not been enacted. It is true that by its terms its effect is limited to the duration of the Fifty-eighth Congress, but I do not understand this as meaning that Congress intended the Canal Zone to be without any legal government after the period fixed. Such a conclusion would be, in my opinion, wholly inadmissible, in view of the universally recognized duty on the part of any civilized power to provide a government for all territory under its control; and the limitation of time mentioned in this section must be interpreted, in my opinion, as inserted merely to show that, during the period of its own lawful existence, and unless led to hold differently by succeeding events, the Fifty-

eighth Congress intended that the powers of government, which it might have lawfully exercised over the Canal Zone, should be exercised, by its authority and under its delegation, by the President or such officers or persons as he might employ for the purpose. That Congress did not intend, or expect, the President's authority over the Canal Zone to end at the time mentioned in the second section of the act approved April 28, 1904, seems clear by the provision in the act approved December 21, 1905 (34 Stat. 5), making appropriations to continue the construction of the canal, to the effect, that "the President shall annually cause to be made, by the persons appointed and employed by him in charge of the government of said Canal Zone * * * estimates of expenditures." By this provision Congress recognized the President as authorized to govern the Canal Zone and appoint and employ persons to take part in that government. Evidently, then, Congress did not consider the power expressly conferred upon the President by section two of the act of Congress approved April 28, 1904, as terminating at the time mentioned in that section.

His conclusion was that (p. 119)—

I therefore answer your question in the negative and advise you that, in my opinion, the President may now, directly or through the persons appointed and employed by him to govern the Zone and build the canal, adopt needed rules and regulations for the govern-

ment of the Canal Zone, and that he has not lost the power to modify any of the rules and regulations established by the Canal Commission prior to the expiration of the Fifty-eighth Congress.

However, there was express ratification by the Act of August 24, 1912, 37 Stat. 560, c. 390, appendix, p. 50, which in section 2 declared (p. 561):

That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. 48 U. S. Code 1309.

Section 4 of that act (known as the Panama Canal Act) authorized the President to discontinue the Isthmian Canal Commission, when in his judgment the construction of the canal was sufficiently advanced to render its services unnecessary. He was authorized thereafter to complete, govern, and operate the canal and *govern* the Canal Zone, or to cause them to be governed through a Governor of the Panama Canal and such other persons as he might deem competent. The Governor was to be appointed by the President and confirmed by the Senate. All other persons necessary for the completion, management, maintenance, operation, government, and protection of the canal and the Canal

Zone should be appointed by the President, or by his authority. 48 U. S. Code 1305.

Section 7 provided that the Governor of the Panama Canal should have official control and jurisdiction over the Canal Zone and should perform all duties in connection with the civil government of the Canal Zone. It further declared that unless otherwise provided in the act "all existing laws of the Canal Zone referring to the civil governor or the civil administration" thereof should be "applicable to the Governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law." 48 U. S. Code 1307.

By Executive Order of January 27, 1914, effective April 1, 1914, the President established a permanent organization for the canal and the Canal Zone. This included an accounting department.

The regulations governing the accounting department relate specifically to funds deposited in banks, as the Governor's circular No. 660-61 of April 5, 1923, provides:

Postal savings, money orders, clubhouse, and other trust and security funds received shall be remitted to depositories in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the auditor.

It will be remembered that the contract for security herein was executed in 1914, following a practice adopted as to Canal Zone funds in 1909 (R. 15),

so that the Governor's circular just referred to . merely was declaratory of what had been the practice for about 14 years.

That Congress recognized and approved the practice is indicated by sections 6 and 7 of the Act of August 21, 1916, c. 371, 39 Stat. 528, which provide: appendix p. 52.

SECTION 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates *in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him*, shall bear interest at a rate not exceeding two per centum per annum.

SECTION 7. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service. [Italics supplied.]

These sections as amended appear as sections 1324 and 1325 of Title 48 of the U. S. Code.

Of particular significance is section 1 of the Act of February 16, 1933, c. 89, 47 Stat. 812, 48 U. S. Code 1323a, appendix, p. 52, which is as follows:

The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the

conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: Provided, however, That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

This latter statute is clearly in effect a ratification of the action and the policy and practice of the Canal Zone authorities in respect of postal service in the Canal Zone, and is authority for the requiring of security to insure postal service funds, even if there were any doubt of the scope and validity thereof prior thereto. It may properly be construed as validating prior pledges. *McNair, Receiver, etc., v. Knott, Treasurer*, U. S. Supreme Court, decided December 13, 1937.

It should be noted that this statute was enacted prior to the closing of the District National Bank.

These enactments of Congress, the orders of the President and the regulations adopted for the government of the Canal Zone demonstrate that there was authority for the requirement of security not only for the *deposit* money order funds, but also for money order funds and other funds.

II

The giving of security for Canal Zone deposits was recommended, sanctioned, and approved by the Secretary of the Treasury and the Comptroller of the Currency

The answer to the amended bill of complaint averred that the action of the then Secretary of War in negotiating for the giving of securities to safeguard Canal Zone deposits and of entering into the contract with the Bank which is here involved, was the subject of correspondence between him and the Treasury department and was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury (R. 15).

On October 21, 1908, the Chairman of the Isthmian Canal Commission brought to the attention of the Secretary of War the question of the safe-keeping of the money of the Canal Zone government then amounting to more than a million dollars. He stated that it was advisable that the funds should not remain in hands of the Treasurer of the Canal Zone, and also desirable that so much of the moneys as were not in constant use, should draw interest. He recommended arrangements be entered into with the International Banking Company, which had branches in the Canal Zone and whose main office was in New York City, similar to those then existing between the War Department and that Company covering the deposit of Philippine funds.

Thereafter, the matter was taken up with the Treasury Department, which was asked what bonds would be considered satisfactory to secure the deposit. The Acting Secretary of the Treasury on April 21, 1910, advised, among other things, that the kind of bonds named in the press announcement of the Secretary of the Treasury of December 18, 1909, would be satisfactory security; that it would be advisable to divide the deposits between two or more banks, and that the security should be kept in the safe of the Isthmian Canal Commission at Washington.

April 23, 1910, the Secretary of War wrote the Secretary of the Treasury asking the latter's advice as to whether he would consider a deposit with either the Commercial National Bank or the Riggs National Bank, at about two per cent satisfactory, if the deposit were covered by bonds described in paragraphs 2 and 3 of Treasury Department Circular dated December 24, 1908. To this Secretary MacVeagh replied that it would be, if the deposit were covered by bonds described in a Treasury circular.⁵

On July 25, 1914, the Comptroller of the Currency wrote the Secretary of the Treasury in an-

⁵ Thereupon a contract dated May 11, 1910, was entered into with the Commercial National Bank for a deposit of Canal Zone funds and the pledge of security by that bank to safeguard the deposit. That transaction is involved in a suit here on appeal similar in its purpose to the case at bar. It is styled *Inland Waterways Corp. et al. vs. Hardee*, Rec. No. 7056.

swer to the latter's memorandum, that the Commercial National Bank, the Continental Trust Co., and the District National Bank would be pleased to receive Canal Zone deposits and would provide securities to secure them.

Thereupon, Secretary McAdoo wrote the Secretary of War transmitting the Comptroller's memorandum and informing him that the specified banks would comply with the regulations of the War Department relative to deposit of securities.

The Secretary of War then informed the Secretary of the Treasury that it had been decided to make the new deposit with the District National Bank of Washington and the contract of August 18, 1914, Exhibit A, was executed.

In the face of this record of knowledge, approval, and sanction, it is difficult to see any justification for the bringing of this suit by the plaintiff Receiver, the appointee and representative of the Comptroller of the Currency whose predecessor in office had recommended exaction of securities to safeguard deposits in this case and who knew of the action taken in this case and approved of it; especially when it was done in reliance on the advice of the Secretary of the Treasury and the Comptroller of the Currency and was unchallenged and unquestioned for more than fifteen years.

We might also suggest that the situation presented might well call for the application of the legal principle, that the construction given to legis-

lative acts by an agency charged with the execution thereof adhered to over a considerable period of years will be deemed determinately persuasive and will not be lightly put aside, *U. S. v. Hammers*, 221 U. S. 220, 228; *Logan v. Davis*, 233 U. S. 613, 627; *LaRoque v. U. S.*, 239 U. S. 62, 64; *McLaren v. Fleischer*, 256 U. S. 477, 481; *Swendig v. Washington Co.*, 265 U. S. 322, 331.

Here the Secretary of War, the Chairman of the Isthmian Canal Commission and apparently their subordinates considered that the proposed action in respect of securities was authorized under the laws and rules and regulations governing the Canal Zone. The Secretary of the Treasury and the Comptroller of the Currency shared that view and did not express any doubt of the legality of it and are clearly shown to have recommended it. Who of all the officers of the government would be in better position to pass upon the question than these two since national banks are under their supervision?

Furthermore, we submit that in the light of the correspondence between the Secretary of the Treasury and the Secretary of War herein set forth, and particularly the advice given and statements made by the Secretary of the Treasury regarding the depositing of the Canal Zone funds were tantamount to, and a substantial compliance with, the statute authorizing the Secretary of the Treasury to designate national banks as depositaries of public moneys (12 U. S. Code, Sec. 90).

III

The practice of pledging securities to safeguard deposits made by government officers and agencies has existed undisturbed and unquestioned for many years, thus establishing a custom or usage

The defendants' answer set up a custom on the part of national banks of pledging securities for deposits like or similar to the deposit in this case (R. 15, 16).

In the letter to the Secretary of War written October 21, 1908, by the Chairman of the Isthmian Canal Commission (see page 23, *supra*), he recommended arrangements be entered into for the deposit of Canal Zone moneys "similar to those now existing between the War Department and this company (the International Banking Company) covering the deposit of Philippine funds."

This practice in respect to Philippine moneys was initiated in 1908. The custom or practice in respect of Canal Zone funds was, as we have seen, initiated in 1909. Later and in 1921, it was followed in respect of funds deposited by the U. S. Shipping Board Fleet Corporation and about 1926 by the Inland Waterways Corporation.

This practice was not confined to banks in the District of Columbia but followed by banks throughout the United States, particularly in respect of Philippine funds, as to which contracts were made by the Secretary of War acting for the Government of the Philippine Islands. (See paragraph 8, R. 16, which refers to Philippine deposits.)

It is significant that in the *Pottorff* case, the Court referred to the fact that the record in that case was barren of evidence that the practice of pledging assets to secure *private* deposits had ever prevailed among national banks and observed that only two cases, recently decided, are reported involving such a pledge and noted that in the case under consideration there was a specific finding that the challenged pledge was the only instance wherein that bank had ever pledged assets for a private deposit, 291 U. S. 254, 255.

Further, it was said, pages 256, 257, that the fact that the bank had frequently secured private deposits by surety bonds lent no support to the contention that the power to pledge was necessary to carry on the business of deposit banking. The court went on to state:

There is, however, no finding that among national banks there exists the practice of securing by surety bonds some private deposits. If there has been such a practice, it must have been a secret one; for reference to it has not been found in either official reports, or the books on banking or other publications dealing with financial affairs.

The observations and statements cited indicate that if such practice could have been established, that would have been an important factor in the case.

Now, in the instant case, there can be no doubt that the practice of pledging was no secret; it ob-

tained in respect to other funds similar in character deposited in this and other banks in the District. It was followed by many other banks in the United States. Further, these funds differ from the *private* funds considered in the Pottorff case.

Moreover, this practice in respect to Canal Zone funds was known to Congress. In Annual Reports made by the Isthmian Canal Commission to Congress, it was stated that large deposits had been made in Washington banks. (Annual Reports for 1909 to 1915, inclusive.)

In the Annual Report for 1913, the following statement appears, p. 415:

The major portion of the funds of the Canal Zone have been continued on deposit with the two depositories at Washington, D. C., although an amount not exceeding \$100,000 is deposited in one of the banks on the Isthmus. The actual amount in all depositories on June 30, 1913, was \$2,168,339.62, secured by the deposit of high-grade bonds under control of a representative of the Government.

In the Report for 1914, it was said, p. 328:

The major portion of the funds of the Canal Zone have continued on deposit with the two depositories in Washington, although an amount not exceeding \$100,000 is deposited in one of the banks on the Isthmus. The amount on deposit in all depositories June 30, 1914, was \$1,594,285.53, against \$2,168,339.62 on June 30, 1913. These funds

are secured by the deposit of high grade bonds under the control of a representative of the Government.

And in the Report for 1915, the following, pp. 278, 279:

The depositaries of the Canal Zone funds, including in that term money order, postal savings, and clubhouse funds, have been continued three in number, the District National Bank and the Commercial National Bank, of Washington, D. C., and the Panama Branch of the International Banking Corporation. On June 30, 1913, the amount on deposit was \$2,168,339.62; on June 30, 1914, \$1,594,285.53; and on June 30, 1915, \$770,965.18. There is also a small amount still remaining in the Riggs National Bank of Washington, necessarily left there on account of outstanding checks chargeable against the deposit. These funds are all secured by the deposit of high-grade bonds under the control of a representative of the Government. Interest on deposits during the year amounted to \$48,798.35, as against \$61,354.12 received during 1914.

In a report, House Report No. 1083, 67th Congress, 2d Session, made by a Committee of the House of Representatives, on H. R. 11872, which became the act of September 21, 1922, c. 370, 42 Stat. 1004, there was set forth a letter dated September 12, 1919, from the then Secretary of War, Newton D. Baker, to the Speaker of the House, in which he concurred in a recommendation of the

Governor of the Panama Canal for legislation increasing the rate of interest which should be paid on deposit money orders. In that letter, the Secretary of War said:

It should be stated that the postal money-order funds of the Canal Zone are deposited in banks in the United States upon which interest is paid, and which funds are secured by the deposit of certain standard bonds.

The Secretary recommended an amendment to Section 6 of the Act of August 21, 1916, 39 Stat. 528, which provided for 2 percent interest. This was approved by the Committee and was enacted as section 11 of the act of September 21, 1922, *supra*.⁶

So this practice had been in existence twenty-five years when the District National Bank suspended. It was well known to Treasury officials, including the Comptroller of the Currency, and sanctioned and approved by them. Now we think this custom and practice existing and continuing with the advice and consent, certainly with the knowledge and acquiescence of the Secretary of the Treasury and the Comptroller of the Currency, and in this case with the knowledge of Congress, establishes a usage and custom in respect to deposits such as those here specified.

This is not a case where the pledge was in the teeth of a prohibitory law. Here there was no *stat-*

⁶ No record of any report on this Bill by a Senate Committee has been found. Section 11 is now 48 U. S. Code ~~1934~~. Appendix, p. 52.

ute expressly prohibiting such a pledge; the practice over a long period of years had been to give security.

What was said in *U. S. v. Midwest Oil Co.*, 236 U.S. 459, is here pertinent. In that case the power of the President to withdraw public lands reported to contain valuable petroleum deposits was upheld, although there was no statutory authority for it. The court said, p. 469:

We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long-continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn lands which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that "the practice dates from an early period in the history of the government."

and pp. 472, 473:

It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men.

Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

Compare *U. S. v. MacDaniel*, 7 Pet. 1, 14, 15.

We therefore submit that this custom and usage was authority for the pledge.

IV

The Receiver is estopped to maintain this suit because the Comptroller of the Currency and the Conservator of the District National Bank approved, agreed to, and sanctioned the sale of the securities. Even if they acted under a mistake of law, a recovery cannot be had

The bill of complaint alleges, R. 3, that on September 24, 1933, the bonds pledged to secure the deposits of Canal Zone funds were sold to the Hamilton National Bank “under an agreement and arrangement by the defendants * * * with the then Conservator of the District National Bank, whereby the Secretary of War was illegally paid, under a mistake of law, from the proceeds of the sale of said bonds,” the amount of the credit bal-

ances of the two deposit accounts and \$3,535.37 interest, "said above described sums being paid * * * by the setting up of a new deposit account in the Hamilton National Bank * * * in the name of the Secretary of War, Canal Zone Funds."

It appears that these bonds were included with other assets of the District National in a sale made by the Conservator to the Hamilton National, this sale having been approved by the District Court by order of September 7, 1933, in Miscellaneous Proceeding No. 46 "In re Receivership of District National Bank of Washington, D. C." upon the petition of the Conservator for such approval. The record in that case shows also that a formal approval of the proposed sale had been given by the Comptroller of the Currency.

Under date of September 28, 1933, the Deputy Comptroller of the Currency wrote the Conservator of the District National acknowledging receipt of a letter of that date from the latter wherein he advised that among the Class A assets sold to the Hamilton National there were included the pledged bonds which he specified and in which request was made for authority to deliver the securities to the Hamilton Bank. The Deputy Comptroller outlined the situation in respect of these securities, and authorized the delivery with the understanding that they would be pledged immediately by the Hamilton to secure the deposit of the Canal Zone funds.

On October 2, 1933, the Conservator wrote the Chief of Office, Panama Canal, stating that the Hamilton National had purchased the securities, securing the Canal Zone Funds deposits, "subject, of course, to the lien of the Secretary of War to cover the deposits * * *," and informed him that the Comptroller had authorized the consummation of the transaction.

Contemporaneously, the President of the Hamilton National advised the Chief of Office of the purchase of those bonds by it, subject to the lien and that the Hamilton "will assume the payment of the deposits in due course upon the designation by the Secretary of War of the Hamilton National Bank as a depository for the funds."

Thereafter, on October 17, 1933, the bonds were deposited in the vaults of the American Security and Trust Co. as security for the deposit in the Hamilton National Bank to whom, as we have seen, they had been sold.

In the face of this record, it would seem clear that there is no basis now for the plaintiff's claim. These pledged bonds were sold by the plaintiff's predecessor, the Conservator to the Hamilton National, with not only the approval of the Comptroller of the Currency but also of the Court. True, they were sold subject to the lien of the Secretary of War but the title to them passed out of the District National into the Hamilton; there was no payment to the Hamilton by the Conservator for

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the Canal Zone's benefit of any part of the proceeds of that sale.

But even if such payment had been made by the Conservator out of the proceeds of the sale, we assert that the plaintiff receiver, as his successor, cannot maintain a suit to disavow this action of the Conservator, particularly and especially so where the transaction was expressly approved and sanctioned by the Comptroller of the Currency. He is estopped. There is and can be no claim that the Conservator (or the Comptroller of the Currency) did not know all the facts respecting the pledge and what was proposed to be done with the securities. The Conservator had the choice of disaffirming the pledge or of ratifying it. He elected to ratify and neither he nor his successor the plaintiff Receiver is in a position to disavow now.

The cases relied upon by plaintiff, *Texas & Pac. Ry. Co. v. Pottorff*, *Marion v. Sneedon*, and others do not decide the point here presented but deal with a different situation. There the Receiver was seeking to set aside or was disavowing an alleged illegal contract, agreement, or pledge of a *bank*. Here, the Receiver is seeking to disavow what in legal effect is his own act and conduct.

The rule of those cases on this point is that equities or estoppels which might be availed of against the bank are not available against the Receiver. But nothing is said about estoppels or equities which are raised against the Receiver because of *his own conduct as Receiver*.

The plaintiff's bill alleges the "payment" from the proceeds of the sale of the securities to the Hamilton to the Secretary of War was made illegally "under a mistake of law" (bill, R. 3), but this principle is of no help to plaintiff under the circumstances disclosed.

We deem it unnecessary to cite authorities to sustain the general proposition that money paid under mistake of law cannot be recovered.

But there is an exception in respect to certain kinds of transactions by public officers. *Wisconsin R. R. Co. v. United States*, 164 U. S. 190, is a leading case on the exception.

However, we assert that that exception is not available or applicable to this case. First, because this Receiver is not a public officer in the sense in which that term is used in applying the exception. It is true that he is not an officer of the court as is an ordinary Receiver, and that he is termed the instrument or the representative of the Comptroller of the Currency. *O'Connor v. Rhodes*, 65 App. D. C. 21; *Wittnebel v. Loughman*, 9 F. Supp. 465; *Hulse v. Argetsinger*, 18 F. (2) 944; and he is sometimes referred to as an agent or officer of the United States, *Wilson v. Awalt*, 2 F. Supp. 465; *Auten v. U. S. Nat. Bank*, 174 U. S. 125. However, the description of him as an agent or officer of the United States is in contradistinction to the ordinary Receiver who is an officer of the Court. Further, it is established that he stands in the place of the bank taking the assets in trust for the creditors.

Scott v. Armstrong, 146 U. S. 499, and represents the bank; its stockholders and creditors. *O'Connor v. Rhodes*, supra, *Case v. Terrell*, 11 Wall. 199.

Secondly: The exception relates to recovery of *public money* erroneously paid or public property so disposed of by a *public officer*.

Now the plaintiff's bill proceeds on the theory that the proceeds of these bonds were and still are assets of the *Bank* recoverable by the Receiver for the benefit of the Bank and its creditors.

It will be noted that the *Wisconsin R. R. case* was a suit for the recovery of moneys representing overpayments made by the Postmaster General to the railroad company for transportation of mails and which had been deducted from subsequent claims of the railroad for like service. The basis of the deduction was that as the railroad was a land-grant road, it was entitled to but 80% of the full amount. There had been differing construction of the applicable law, one that full compensation should be made; then 80%, then full compensation and lastly, 80%. The Court held that the 80% basis was correct and that the Postmaster General's misconstruction of the law did not bar recovery.

In discussing this exception, the Court said, p. 210:

The question is not presented as between the government and its officer, or between the officer and the recipient of such payments,

but as between the government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of action not authorized by law, resulting from an erroneous conclusion by the agent of the government as to the legal effect of the particular statutory law under or in reference to which he is proceeding. [Emphasis supplied.]

The case of *Duval v. U. S.*, 25 Ct. Cl. 46, cited in the opinion, is seen to relate to payments of public moneys upon balances certified by the government accounting officers.

Barnes v. District of Columbia, 22 Ct. Cl. 366, also referred to in the opinion related to payments made under mistake of law, by officers of the District on a contract. The Court quoted from the opinion of the Court of Claims, thus, p. 212:

the doctrine that money paid can be recovered back when paid in mistake of fact and not of law does not have so general application to *public officers using the funds of the people* as to individuals dealing with their own money where nobody but themselves suffer for their ignorance, carelessness, or indiscretion, because in the former case the elements of agency and the authority and duty of officers, and their obligations to the public, of which all persons dealing with them are bound to take notice, are always involved.

The Supreme Court added:

We concur in these views, and are of opinion that there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them. [Emphasis supplied.]

We, therefore, confidently contend that the Receiver is estopped from recovering in this case.

This estoppel cannot be avoided by a claim that, pointing to the *Pottorff* and *Sneedon* cases, it is the duty of the Receiver to sue to recover the alleged illegally paid proceeds. That could be urged if the Conservator had not approved the transaction, under the authority given him by the Comptroller of the Currency. So far as the plaintiff Receiver is concerned, that action of the Conservator is binding on him and is in legal effect, the same as if he had himself acted.

The language used in the *Pottorff* and *Sneedon* cases must be taken in the setting of those cases. We have already noted that those cases involved action by the Receiver disavowing action of the bank. Here the Receiver is attempting to disavow what in effect is *his own* action.

Further, it is respectfully submitted, the decision of this Court in *O'Connor v. Rhodes, supra*, does not foreclose this point. That opinion specifically states that two points are considered and decided, namely: (1) the right of a depositor to maintain the suit without the consent of the Comptroller of

the Currency and (2) whether a national bank is authorized to give security for deposits, in the absence of statutory authority therefor.

Thus, it seems clear that the question of estoppel is open and unaffected by that decision.

V

The United States is an indispensable party to this suit

The funds deposited in the District National Bank were, as we have seen, almost entirely composed of deposit money order and money order funds (75 per cent of the former, 25 per cent of the latter).

Now, as has been pointed out, the Postal Savings System Act of the United States was made applicable to the Canal Zone. That act pledged the faith of the United States to the payment of such deposits. If such funds are diminished because of insolvency of a bank, then the United States will be compelled to make good. Manifestly in such a situation, the Court ought not to proceed to a determination of the issues in the absence of the United States. Nor is this point cured or avoided by the fact that what is sought is the recovery of the proceeds of the securities taken over by the Secretary. They stand in place of and as and for the deposits and the same considerations would apply, and the consequence of the recovery of them would be a loss to the government.

But we need not limit the point to the deposit money order funds. We put it upon broader grounds.

A survey of the status of the Canal Zone and the legislation in respect thereof, covered to some extent under point I of this brief (pp. 10-22), leads indubitably to the view that the Canal Zone government is but an instrumentality of the United States for the control of the canal and the Canal Zone. The authority and control of the zone is vested in the Secretary of War as the delegate of the President of the United States to administer as property or territory of the United States. (See 26 Op. A. C., 113 *supra*.)

Congress has from the acquisition of this territory appropriated for its administration and government. For example, see Act of June 30, 1906, c. 3914, 34 Stat. 761-2; Act of June 25, 1910, c. 384, 36 Stat. 771-2; Act of August 24, 1912, c. 355, 37 Stat. 483-85; Act of May 15, 1936, c. 404, 49 Stat. 1307-09.

Therefore any loss which would result from the recovery of the proceeds would be the loss of the United States and there would be a loss because the United States would be compelled to pay the money orders and repay the deposits represented by the deposit money orders. Further, the increment arising from interest on these deposits goes to the United States.

No citation of authorities is needed on the proposition that right of an absent party may not be adjudicated in its absence.

The relation of indispensable parties to the suit must be such that no decree can be entered in the case which will do justice to the parties before the court without affecting the rights of absent parties. *United Shoe Mach. Co. v. U. S.*, 258 U. S. 451, 456.

See also *Shields v. Barrow*, 17 How. 130, 139; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 235; *New Mexico v. Lane*, 243 U. S. 52; and *Commonwealth Trust Co. v. Smith*, 266 U. S. 152.

We therefore say that the United States is an indispensable party.

And for the same reasons, we say that the suit is in essence one against the United States, which has not consented to be sued in such a proceeding as this.

That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered. *Minnesota v. Hitchcock*, 185 U. S. 373, 387, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650; *Kansas v. United States*, 204 U. S. 331, 333, 51 L. ed. 510, 27 Sup. Ct. Rep. 388.

Louisiana v. McAdoo, 234 U. S. 627, 629.

Now, we are aware that in the Rhodes case, this court held that that suit was not one against the United States. However, that suit did not involve the Canal Zone funds but considered funds of the U. S. Shipping Board Merchant Fleet Corporation and funds held by the Attorney General as successor to the Alien Property Custodian.

And further the facts as to the character of these deposits and of the interest of the United States were not developed as we have developed them in respect of the Canal Zone funds. That case was considered on the record made on a denial of a motion to dismiss.

It is important to recall the recital of the contract or agreement of August 18, 1914, under which the deposits were made and the securities pledged. Therein the Secretary of War is thus described "the executive officer of the United States charged by the President with the supervision and control over the governmental affairs of the Canal Zone," and this establishes that the Bank recognized that it was dealing with the United States, since the President was the delegate of Congress, with power himself to delegate, in the governing of and legislating for the Canal Zone. This gives emphasis to the point that the interest of the United States is involved and that in reality the suit is against the United States.

In this connection, the case of *New York ex rel. Rogers v. Graves*, 299 U. S. 401 is helpful as to the

status of the Canal Zone. That case raised the question of whether the salary of the General Counsel of the Panama Railroad Company was exempt from payment of income tax claimed by the State of New York. The Court held that it was exempt, because the Railroad was an instrumentality of the Federal Government. In the opinion the court discusses the status of the Railroad and also of the Panama Canal and the Canal Zone. After referring to some of the provisions of the Act of June 28, 1902, and of August 24, 1912, the court said, pages 405-406:

We need not particularize further. Chapter 6, Title 48 U. S. C., discloses a large body of laws passed by Congress for the government and control of the canal, and of both the Canal Zone and the railroad company as necessary adjuncts of the canal.

That under these laws, the creation, management and operation of the canal are all governmental functions and the laws well within the constitutional power of Congress to provide for the national defense and to regulate commerce under the commerce clause of the Constitution, does not admit of doubt. *California v. Central Pacific Railroad Co.*, 127 U. S. 1, 39; *Luxton v. North River Bridge Co.*, 153 U. S. 525.

* * * * *

Such being the status of the canal, it requires no argument to demonstrate that all auxiliaries primarily designed and used to aid in its management and operation, and

which have that effect, partake of its nature and are themselves cooperating regulators—or, perhaps more accurately speaking, constitute, with the canal, a single great regulator—of national and international commerce. And this, we think, is the effect of the inter-relation of the railroad company's activities with the management and operation of the canal.

CONCLUSION

It is respectfully submitted that the Court below erred in entering a decree against these defendants and that that decree should be reversed.

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Acting United States Attorney.

H. L. UNDERWOOD,

Assistant United States Attorney.

LESLIE C. GARNETT,

Special Assistant to the

Attorney General,

Of Counsel.

APPENDIX

Act of June 28, 1902, 32 Stat. 481:

SEC. 2. That the President is hereby authorized to acquire from the Republic of Columbia, for and on behalf of the United States, upon such terms as he may deem reasonable, perpetual control of a strip of land, the territory of the Republic of Columbia, not less than six miles in width, extending from the Caribbean Sea to the Pacific Ocean, and the right to use and dispose of the waters thereon, and to excavate, construct, and to perpetually maintain, operate, and protect thereon a canal of such depth and capacity as will afford convenient passage of ships of the greatest tonnage and draft now in use, from the Caribbean Sea to the Pacific Ocean, which control shall include the right to perpetually maintain and operate the Panama Railroad, if the ownership thereof, or a controlling interest therein, shall have been acquired by the United States, and also jurisdiction over said strip and the ports at the ends thereof to make such police and sanitary rules and regulations as shall be necessary to preserve order and preserve the public health thereon, and to establish such judicial tribunals as may be agreed upon thereon as may be necessary to enforce such rules and regulations. * * *

SEC. 7. That to enable the President to construct the canal and works appurtenant thereto as provided in this Act, there is

hereby created the Isthmian Canal Commission, the same to be composed of seven members, who shall be nominated and appointed by the President, by and with the advice and consent of the Senate, and who shall serve until the completion of said canal unless sooner removed by the President, and one of whom shall be named as the chairman of said Commission. Of the seven members of said Commission at least four of them shall be persons learned and skilled in the science of engineering, and of the four at least one shall be an officer of the United States Army, and at least one other shall be an officer of the United States Navy, the said officers respectively being either upon the active or the retired list of the Army or of the Navy. Said commissioners shall each receive such compensation as the President shall prescribe until the same shall have been otherwise fixed by the Congress. In addition to the members of said Isthmian Canal Commission, the President is hereby authorized through said Commission to employ in said service any of the engineers of the United States Army at his discretion, and likewise to employ any engineers in civil life, at his discretion, and any other persons necessary for the proper and expeditious prosecution of said work. The compensation of all such engineers and other persons employed under this Act shall be fixed by said Commission, subject to the approval of the President. The official salary of any officer appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this Act. Said Commission shall in all matters be subject to the direction and control of the President, and shall make to the

President annually and at such other periods as may be required, either by law or by the order of the President, full and complete reports of all their actings and doings and of all moneys received and expended in the construction of said work and in the performance of their duties in connection therewith, which said reports shall be by the President transmitted to Congress. And the said Commission shall furthermore give to Congress, or either House of Congress, such information as may at any time be required either by Act of Congress or by the order of either House of Congress. The President shall cause to be provided and assigned for the use of the Commission such offices as may, with the suitable equipment of the same, be necessary and proper, in his discretion, for the proper discharge of the duties thereof.

Act of April 28, 1904, 33 Stat. 429:

SEC. 2. That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the Government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion.

Act of August 24, 1912, 37 Stat. 560:

SEC. 2. That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone by Executive order are recognized and confirmed to continue in operation until the courts provided for in this Act shall be established. 48 U. S. Code 1309.

SEC. 4. That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation pro-

vided by or which shall be fixed under the terms of this Act. The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified. He shall receive a salary of ten thousand dollars a year. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States. * * * 48 U. S. Code 1305.

SEC. 7. That the governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law. * * * 48 U. S. Code 1307.

Act of August 21, 1916, 39 Stat. 528, 48 U. S. Code 1324, 1325:

SECTION 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.¹

SECTION 7. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service.

Act of February 16, 1933, 47 Stat. 812, 48 U. S. Code 1323a:

SEC. 1. The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: Provided, however, That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

¹ Three per centum by amendatory Act of September 21, 1922, c. 370, sec. 11, 48 U. S. Code 1324.

12 U. S. Code 90:

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: Provided, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: Provided, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.

Act of June 25, 1910, 36 Stat. 814, as amended (39 U. S. Code, Secs. 759, 766) :

SEC. 9. Postal savings funds received under the provisions of this chapter shall be deposited in solvent banks, whether organized under national or State laws, and whether member banks or not of the Federal reserve system, being subject to national or State supervision and examination, and the sums deposited shall bear interest at the rate of not less than $2\frac{1}{4}$ per centum per annum, which rate shall be uniform throughout the United States and Territories thereof; but 5 per centum of such funds shall be withdrawn by the board of trustees and kept with the Treasurer of the United States, who shall be treasurer of the board of trustees, in lawful money as a reserve. The board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand. The funds received at the postal savings depository offices in each city, town, village, and other locality shall be deposited in banks located therein (substantially in proportion to the capital and surplus of each such bank) willing to receive such deposits under the terms of this chapter and the regulations made by authority thereof. * * *

SEC. 16. The faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon as herein provided.

UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1937.

—

No. 7055.

—

HARRY H. WOODRING, Secretary of War, and H. A. A.
SMITH, General Purchasing Officer and Chief of
Washington Office, Panama Canal, *Appellants*,

v.

JUSTUS S. WARDELL, Receiver, District National Bank
of Washington, D. C., *Appellee*.

—

**BRIEF OF APPELLEE IN REPLY TO BRIEF
FILED BY HARRY H. WOODRING, SECRE-
TARY OF WAR, AND H. H. A. SMITH, GEN-
ERAL PURCHASING OFFICER AND CHIEF
OF WASHINGTON OFFICE, PANAMA CANAL**

—

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No. 7055.

HARRY H. WOODRING, Secretary of War, and H. A. A.
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Washington Office, Panama Canal, *Appellants*,

v.

JUSTUS S. WARDELL, Receiver, District National Bank
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**BRIEF OF APPELLEE IN REPLY TO BRIEF
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TARY OF WAR, AND H. H. A. SMITH, GEN-
ERAL PURCHASING OFFICER AND CHIEF
OF WASHINGTON OFFICE, PANAMA CANAL.**

PRELIMINARY STATEMENT.

On June 4, 1936, appellee, plaintiff below, filed an amended bill of complaint against appellants and others, seeking to recover certain bonds of the District National Bank of Washington, or the proceeds thereof,

upon the theory that the pledging of these assets by the bank to secure deposits of money order funds from the Panama Canal Zone was neither authorized nor required by any Act of Congress, and hence was illegal.

At the time of bringing the suit it had been clearly indicated by the decisions of the Supreme Court of the United States in *Texas and Pacific Railway Co. v. Pottorff*, 291 U. S. 245, and *City of Marion v. Sneed*, 291 U. S. 262, that it was the duty of the Receiver of a national bank, in such a situation, to sue for and recover the pledged assets.

Appellants answered and relied upon three main points as a defense to the amended bill:

1. Authority for the pledge existed;
2. Estoppel arising out of
 - (a) Approval of the pledge by the Secretary of the Treasury and by the Comptroller of the Currency;
 - (b) Knowledge and recognition of the practice of pledging securities establishing custom and usage;
 - (c) Approval by the Comptroller and by the bank's conservator of the sale of the assets by the pledgee.

3. The United States is an indispensable party to the suit.

Appellee moved to strike all portions of the answer containing these defenses and for a decree *pro confesso* against appellants, which was granted. Electing to stand upon their answer, and consenting to the entry of a final decree instead of a decree *pro confesso*, a final decree and judgment was entered on August 18,

1937 (R. 23) against appellants for the sum of \$207,361.41 with interest at the legal rate, said judgment being subject to credit for dividends due to general creditors, and said interest to be computed and adjusted accordingly. This decree also provided that appellants may file claim against the Receiver and shall receive such further dividends as are paid to general creditors of the bank.

From the decree and judgment appellants perfected an appeal to this Court. There being no facts in dispute, the case is presented solely on the issues of law raised by this record.

SUMMARY OF THE ARGUMENT.

1. No authority existed for the pledging of the bank's assets to secure deposits of Canal Zone funds.
2. Appellee receiver is not estopped from recovering back the pledged assets, or their proceeds, even though the Secretary of the Treasury and the Comptroller did approve the pledge.
3. Knowledge and recognition of the practice of pledging assets by national banks to secure similar deposits could not work an estoppel upon appellee receiver from receiving back the pledged assets of their proceeds.
4. Approval of the sale of the pledged assets by the Comptroller and the bank's conservator could not estop appellee receiver from recovering back the pledged assets of their proceeds.
5. The United States is not an indispensable party to the suit.

ARGUMENT.

I.

No Authority Existed for the Pledging of the Banks Assets to Secure Deposits of Canal Zone Funds.

The issue on this phase of the question was summed up with the greatest clarity by the present Chief Justice, Mr. Justice Groner, of this Court in *O'Connor v. Rhodes*, 65 Appeals D. C. 21, (79 Fed. (2) 146), when he said that in order to make a valid pledge in such a case, it was necessary for "Congress by express authority to direct the custodian of federal funds, without regard to whether they be technically public or private funds, to deposit them in a national bank and to exact security from the bank for their repayment."

Furthermore, the *Rhodes* case and the *Pottorff* (*Texas and Pac. R. Co. v. Pottorff*, 291 U. S. 245) and *Sneeden* (*City of Marion v. Sneeden*, 291 U. S. 262) cases make it clear *why* only an Act of the Congress itself is sufficient to make legal the securing of deposits by a national bank. This reason is that national banks are creatures of the Congress and, therefore, only the Congress has the right to amend their charters. Furthermore, it was clearly decided by the Supreme Court in the *Pottorff* and *Sneeden* cases that in order for such pledges to be legal, it was necessary that either one of two sets of facts must appear, namely:

1. If it is claimed that the deposit and the securing thereof is one of public money of the United States made in accordance with Section 90, Title 12 U. S. C. A., then the depository must be designated as such by the Secretary of the Treasury under regulations prescribed by him and the Secretary of the Treasury must require security satisfactory to him; or

2. If it is not claimed that the money involved is public money of the United States and if it appears that the deposit and the designation as a depository was not made by the Secretary of the Treasury under Section 90, Title 12, U. S. C. A., then there must exist a specific Act of Congress authorizing some other official to designate the depository, deposit the money and require the giving of security.

That this is the law is clearly settled by the Supreme Court of the United States, by this Court and by other Circuit Courts of Appeal, as shown by the following quotations:

The United States Supreme Court in *Texas and Pacific Railway Company v. Pottorff*, 291 U. S. 245:

“The measure of their powers (that is the powers of national banks) is the statutory grant; and powers not conferred by Congress are denied.” (P. 253)

“To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets.” (P. 255)

The United States Supreme Court in *City of Marion v. Sneed*, 291 U. S. 262:

“For the reasons stated in *Texas & Pacific Ry. Co. v. Pottorff*, No. 128, decided this day, we are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under Sec. 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to securing specific federal funds.” (P. 268)

The United States Court of Appeals for the District of Columbia in *O'Connor v. Rhodes*, 65 App. D. C. 21, 79 Fed. (2) 146:

"We take the Pottorff and Sneed cases to hold that under the national banking laws a national bank has no power to pledge its assets to secure a deposit, private or public, unless it is authorized or required to do so by an appropriate act of Congress. If we are correct in giving the decisions this interpretation, it follows that we must have recourse to the statutes to answer the question."

To the same effect see:

B. & O. Ry. Co. v. Smith, 56 Fed. (2) 799 (C. C. A. 3),
American Legion, et al. v. Spurway, 69 Fed. (2) 223 (C. C. A. 5),
Griffin v. Royall, 70 Fed. (2) 103 (C. C. A. 4),
Nelson v. Lewis, 73 Fed. (2) 521 (C. C. A. 2),
Utter v. Eckerson, 78 Fed. (2) 307 (C. C. A. 9),
Fidelity & Casualty Co. of N. Y. v. Allen, 84 Fed. (2) 53, (C. C. A. 7),
Webb v. American Surety Co. of N. Y., 88 Fed. (2) 171 (C. C. A. 5),
Buckley v. Southwestern Nat'l. Bank, 88 Fed. (2) 263 (C. C. A. 3),
Granzow v. Village of Lyons, 89 Fed. (2) 83 (C. C. A. 7),
Queenan v. Mays, 90 Fed. (2) 525 (C. C. A. 10),
Hood v. Hardesty, No. 4199 Op. Jan. 4, 1938 (C. C. A. 4),
Leonard v. Gage, No. 4219 Op. Jan. 4, 1938 (C. C. A. 4),
Mays v. Wilkinson, 12 Fed. Sup. 350 (D. C. Okla.),
Harrell v. Lawhead, 13 Fed. Sup. 298 (D. C. W. Va.),

Sumner v. F. 158
 291 U.S. 518

Ross v. Lee, 15 Fed. Sup., 972 (D. C. Fla.),
Faircloth v. Atlantic City, 16 Fed. Sup. 131 (D.
 C. N. J.),
Thompson v. Twin Falls, etc., 17 Fed. Sup. 705,
Adams v. Cribbis, 17 Fed. Sup. 723 (D. C. Code),
Rusch v. Baer, 18 Fed. Sup. 732 (D. C. Ill.).

Following the inquiry logically to the next step, the following propositions appear to be established by the pleadings, the record and the law, namely:

A. The deposits in behalf of the Canal Zone in the District National Bank were not deposits of public moneys of the United States and were not made in accordance with Section 90, Title 12 U. S. C. A. in that the depository was not designated as such by the Secretary of the Treasury under regulations prescribed by him, and the Secretary of the Treasury did not require security for such deposits satisfactory to him.

B. There does not exist any specific Act of Congress authorizing the Secretary of War or any other official to designate a depository in United States national banks for the funds deposited by the Canal Zone in the District National Bank or authorizing any official to require the giving of security for such deposits.

These propositions will be dealt with in order.

A. The deposits in behalf of the Canal Zone in the District National Bank were not deposits of public moneys of the United States and were not made in accordance with Section 90, Title 12 U. S. C. A. in that the depository was not designated as such by the Secretary of the Treasury under regulations prescribed by him, and the Secretary of the Treasury did not require security for such deposits satisfactory to him.

To determine whether the deposits in question and the securing thereof were ordered by the Secretary of the Treasury under Section 90, Title 12 U. S. C. A. that section is quoted textually as follows:

“Depositories of public moneys and financial agents of Government. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositories of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositories of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: Provided, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depository of the public money shall take and receive at par all of the national currency bills, by whatever associa-

tion issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections. (R. S. Sec. 5153; Mar. 3, 1901, c. 871, Sec. 1, 31 Stat. 1448; Mar. 4, 1907, c. 2913, Sec. 3, 34 Stat. 1290; Dec. 23, 1913, c. 6, Sec. 27, 38 Stat. 274; Aug. 4, 1914, c. 225, 38 Stat. 682.)”

Interpreting this language, this Court in an opinion by Mr. Chief Justice Groner in *O'Connor v. Rhodes*, *supra*, said:

“Taking these allegations as true, we think it is clear that nothing in Rev. St. Sec. 5153 (Section 90, Title 12, just quoted) can be said to authorize the taking of a pledge by the several depositors, acting independently of the Secretary of the Treasury, for the safe return of the deposits. There is nothing to show that the deposits were made by direction of the Secretary, or that the fund was subject to his check or control—but everything to the contrary.

“There is nothing to show that the depository bank was designated by the Secretary of the Treasury, under regulations prescribed by himself, to receive the deposits or that he exacted the pledges which are the subject matter of the suit. On the other hand, the statement is that the pledges were in each case taken (a) by the Comptroller, (b) by the Fleet Corporation, and (c) by the Alien Property Custodian.

“In this aspect we think the point is broader than the question whether the money is public money, and embraces also the further question whether the pledges (except in the case of the Comptroller, which we think is controlled by another act) were taken in accordance with the pro-

visions of Rev. St. Sec. 5153. For, as we have seen, when national banks are made depositaries of public money, it is the duty of the *Secretary of the Treasury* to require them to give satisfactory security by deposit of bonds, etc., and when this is not done the Government occupies no higher status than a private depositor. Cook County Bank Case, *supra*. The duty imposed on the Secretary, as we think, is personal and results from the statute we have been discussing, and that Congress meant its language and provisions to be taken literally follows, we think, from the fact that by later acts, to which we shall now refer, Congress, to cover the cases of deposits of federal funds made by others than the Secretary of the Treasury, has specifically provided for such cases by appropriate statutes."

In the case now before the Court, although in the brief of appellants it is argued that certain informal correspondence with the Secretary of the Treasury was "tantamount to and in substantial compliance with" Section 90 of Title 12, U. S. C. A., the answer of appellants specifically admits (R. 20) that the deposits in question were not public funds and not part of the revenue of the United States, and not subject to the control of the Secretary of the Treasury, and that the District National Bank was never designated by the Secretary of the Treasury as depository of the Government of the Panama Canal, and further, that the Secretary of the Treasury did not exact of said bank the pledge of the securities given to insure the deposits of the Panama Canal funds.

The bill of complaint, paragraph 9, (R. 6), specifically alleges (1) that the moneys involved "are not moneys of the United States, are not part of the revenues of the United States" and (2) are not subject

to the control of the Secretary of the Treasury of the United States in his official capacity as Secretary of the Treasury with respect to moneys of the United States, and (3) "are not moneys of the Panama Canal," (4) "have not been covered into the Treasury of the United States or the Treasury of any state, territory, or other government" and (5) that the "District National Bank of Washington, D. C., was never designated by the Secretary of the Treasury under regulations prescribed by said Secretary, to receive deposits of the Government of the Canal Zone," and further (6) "nor did the Secretary of the Treasury exact from said District National Bank of Washington, D. C., the pledges of securities which are the subject matter of this suit." The answer of the Panama Canal Zone and of the Secretary of War for such Zone (R. 20) admits that the moneys involved (1) "are not public funds and are not part of the revenue of the United States" and (2) "that they are not subject to the control of the Secretary of the Treasury in his official capacity as such Secretary in respect of public moneys of the United States." They alleged, however, that the moneys (3) "are moneys of the Panama Canal." They admit (4) "That the District National Bank was never designated by the Secretary of the Treasury as depository of the Government of the Canal Zone." They also admit (5) "that the Secretary of the Treasury did not exact of the said Bank, the pledge of the securities given to insure the deposits of the Panama Canal funds."

It must be concluded, therefore, that under the issues as presented to the Court, it is not even claimed that this case falls within Section 90, Title 12 U. S. Code authorizing the Secretary of the Treasury to

designate depositories of public money and to require security for such deposits.

The facts with respect to the designation of the District National Bank of Washington as a depository of Canal Zone funds, with respect to the making of the actual deposits and with respect to requiring and receiving security for such deposits and the sale of the security after the closing of the bank, are made clear in the bill of complaint and answer and may not be varied by the arguments and quotations from letters contained in Appellants' brief.

The bill of complaint in paragraph 7 (R. 2) alleges that the *Secretary of War* opened the deposit account in the District National Bank designated under the caption "Secretary of War, Canal Zone Funds, Call Account." It is further alleged in the same paragraph that the "*Secretary of War*" did on the 18th day of August, 1914, open a further account under the caption "Secretary of War, Canal Zone Funds, Checking Account."

In the same paragraph of the bill of complaint (R. 3), it is alleged that the bank deposited the securities "with the then Secretary of War by the delivery to his subordinate officer, the then General Purchasing Officer of the Panama Canal." Further in the same paragraph (R. 3) it is alleged that after the closing of the bank, the bonds were sold by order of the "Secretary of War."

The answer (R. 13) admits that the collateral security was received by the Secretary of War through the General Purchasing Officer of the Panama Canal and also admits the designation of the bank as depository by the Secretary of War and the making of the deposit by the Secretary of War.

The nature of the deposits is specified in the answer (R. 13 and 14) wherein it is alleged that the making of the deposit and the requirement of security "were in all respects regular, lawful and in accordance with authority conferred upon the *Secretary of War* under *Acts of Congress and regulations pursuant to statutory authority.*" To make this point entirely clear, it is further alleged in the answer (R. 13) that the making of the contract for the deposit and delivery of said securities "was within the authority and power of the *Secretary of War* conferred upon him by Acts of Congress and by regulations promulgated pursuant to statutory authority."

The nature of the deposits is further specified in the answer (R. 14) when the claim is made that the money deposited in the District National Bank was "almost entirely composed of moneys received by the Postal Service of the Canal Zone and consisted of deposit money order funds and money order funds." The exact basis of the defense is then specified in the answer (R. 14) by the statement that by implication the requirements of the United States statutes with respect to the deposit and securing of United States Postal Savings funds had been read into the laws and regulations for the Canal Zone.

Nowhere in the answer is the defense set up that the deposit here in question or the securing of such deposit was made under the provisions of Section 90, Title 12 U. S. C. A. (Revised Statutes, Section 5153), or that the District National Bank was designated for this purpose by the Secretary of the Treasury under regulations prescribed by the Secretary of the Treasury or that the deposit was made by the Secretary of the Treasury or that the requirement as to the giving of

security for the deposit was made by the Secretary of the Treasury. As already stated, the contrary is admitted (R. 20).

Furthermore, it is clear that none of the requirements, specified by the Secretary of the Treasury with respect to deposits of public money which were made under Sec. 90, Title 12, were met. A copy of the regulations of the Secretary of the Treasury under Sec. 90 is included in the appendix beginning at page 67. This being a public document it is submitted the Court will take judicial notice of its contents.

It results, therefore, that if such securing of these deposits is to be held legal, authority must be found in some other specific Act of Congress.

B. There does not exist any act of Congress authorizing the Secretary of War or any other official to designate a depository in United States National Banks for the funds deposited by the Canal Zone in the District National Bank or authorizing any official to require the giving of security for such deposits.

Appellants point to no statute, nor is there any specific Act of Congress, authorizing the securing of Panama Canal Zone deposits of any sort in the District National Bank or any other bank. In lieu of pointing to any such specific Act of Congress, which does not exist, appellants rely upon various executive orders, letters, orders of the Governor of the Panama Canal Zone, Acts of the Isthmian Canal Commission, Opinions of the Attorney General of the United States, letters of the auditor and Treasurer of the Panama Canal Zone and similar documents, none of which are in the record, to establish by inference that Congress *impliedly* authorized the securing of these deposits.

Three principal contentions may be made against this conclusion, namely,

a. *Under the rulings of the United States Supreme Court and this Court, the Act of Congress authorizing the securing of a deposit by a national bank must be explicit and specific and may not be implied;*

b. *The legislative power of Congress may not be delegated to the extent of permitting subordinate officers to amend the charter of a national bank or to give a preference among creditors; and*

c. *The executive orders, letters, etc., cited in the answer do not even impliedly constitute an Act of Congress for the securing of Canal Zone money order funds.*

These points will be dealt with in order.

a. *Under the Rulings of the United States Supreme Court and this Court, the Act of Congress Authorizing the Securing of a Deposit by a National Bank Must be Explicit and Specific and May Not be Implied.*

That this is true results from the very nature of the power involved because only Congress has the power to authorize a national bank to secure a particular depositor and thus give a preference over their deposits in derogation of the specific Act of Congress (Revised Statutes, Section 5236; Section 194, Title 12 U. S. C. A.) providing that assets of a closed national bank must be distributed ratably among creditors. Thus the power involved is not only the power to amend a charter of a national bank, but also is the power to

amend a specific Act of Congress—in this case, Revised Statutes, Section 5236, just referred to, reading as follows:

“Dividends on adjusted claims; distribution of assets. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. Sec. 5236).”

This statute has been held many times by the United States Supreme Court to mean that even with respect to the United States government no preference in the distribution of assets shall be given to anyone except where Congress itself has specifically authorized such preference, the Act of Congress allowing such a preference in that event acting as an amendment to the “No preference” statute just quoted. Thus in *Cook County National Bank v. United States*, 107 U. S. 445, the Supreme Court decided that even where postal and money order funds have been deposited by a Deputy Postmaster without security in a bank, which subsequently becomes insolvent, a bill by the United States claiming a priority over other creditors will be dismissed.

Applying this reasoning, the Supreme Court and this Court have said that to authorize the pledge, there must be an Act of Congress and it must be specific.

“The measure of their powers (that is the powers of national banks) is the statutory grant; and powers not conferred by Congress are denied.” *Texas and Pacific Railway Company v. Pottorff, supra.*

“We take the Pottorff and Sneed cases to hold that under the national banking laws a national bank has no power to pledge its assets to secure a deposit, private or public, unless it is authorized or required to do so by *an appropriate act of Congress.*” *O'Connor v. Rhodes, supra.*

As previously stated, it is not even alleged in the answer to the bill of complaint nor asserted in appellants' brief that there exists any specific Act of Congress authorizing the pledges involved in this suit.

b. *The Legislative Power of Congress May Not Be Delegated to the Extent of Permitting Subordinate Officers to Amend the Charter of a National Bank or to Give a Preference Among Creditors.*

The creation of ordinary corporations and also of public *quasi* corporations for governmental purposes are within the scope of legislative rather than executive or judicial power and the grave elements involved in the amendment of a corporate charter are specified and outlined at length in the *Dartmouth College* case and the hundreds of cases citing it.

Therefore, it is clear that the altering of the charter of a corporation, particularly the charter of a *quasi* public corporation, such as a national bank exercising as it does many governmental functions, is not the

mere making of administrative rules, but represents the exercise of one of the highest legislative powers and it has been held many times that while the legislative body may delegate authority to make rules and to carry out the legislative mandate, the legislative power proper may not be delegated either to the President of the United States or to anyone else.

Marshall Field & Co. v. Clark, 143 U. S. 649, 692;

U. S. v. Grimaud, 220 U. S. 506;

Wilkinson v. U. S. 207 U. S. 462;

State v. Great Northern Railway Company, 100 Minn. 445, 111 N. W. 289.

It is equally clear that Congress has no power to delegate the right to amend its own laws and it has been shown above that the granting of the power to an official of the government to require security for deposits in a national bank involves an amendment of the "no preference" statute passed by Congress with respect to national banks.

As will be shown below, the maximum of authority to secure the deposits involved in this suit is derived from an alleged delegated and redelegated authority in that it is urged that the Congress authorized the President of the United States to make rules and regulations for the Panama Canal Zone and the President in turn redelegated this authority to make rules and regulations over to the Governor of the Panama Canal Zone and the Isthmian Canal Commission under the general supervision of the Secretary of War and that the Secretary of War and the Chairman of the Isthmian Canal Commission required the securing of the deposits in suit. It may not be successfully disputed, therefore, that to the extent that these deposits were

secured, it was not done under any specific Act of Congress, but was done as a result of an alleged delegation of power.

c. The Executive Orders, Letters, Etc., Cited in the Answer Do Not Even Impliedly Constitute an Act of Congress for the Securing of Canal Zone Money Order Funds.

Before reviewing the various executive orders, letters, etc., which it is claimed furnished the basis of the authority to require the securing of these particular deposits, the facts should be clarified as to exactly what the deposits consisted of.

Such funds consisted of "money order funds" paid into post offices in the Panama Canal Zone either for transmission to points in the United States or made payable at the office where the money orders were purchased as a means of safeguarding the funds of the person purchasing the money order.

As stated herein previously, the answer of the appellants alleges (R. 14) that the money involved in this suit was "almost entirely composed of moneys received by Postal Service of the Canal Zone and consisted of *deposit money order funds and money order funds.*" Appellants' brief (p. 15) states that "about 75 per cent of the funds deposited in the District National Bank, which are here involved, consisted of moneys represented by such deposit money orders. About 25 per cent consisted of moneys received for money orders." (Although this latter statement is outside of the record, it will be accepted as correct for the purpose of this argument.)

It is assumed no argument is required to establish with respect to the United States that "Postal Sav-

ings funds” and “money order funds” are entirely separate and distinct and that, therefore, the terms may not be interchanged. *Postal Savings* funds and *money order* funds in the United States are governed by entirely distinct Acts of Congress, particularly with respect to the disposition of the money derived from such sources. The United States Postal Savings System, created in 1910 by the United States Postal Savings Act (Title 39 U. S., Sections 751-769, inc.), provides in Section 759 that Postal Savings funds “received under the provisions of this chapter shall be deposited in solvent banks” by the Board of Trustees of the Postal Savings System consisting of the Postmaster General, the Secretary of the Treasury and the Attorney General, and that such Board of Trustees shall require security for such deposits from such banks.

Money order funds, however, are entirely different. United States “money order funds” are not part of the postal revenues of the United States (Postal Laws and Regulations of the United States-1932, Sec. 103) although they are “money-order funds and money in the Treasury of the United States,” Section 736, Title 39 USCA—Revised Statute 4045.

It will be shown hereinafter that no authority in law existed for the securing of the particular funds in this suit, which admittedly were money order funds, but first it will be shown that the laws in the United States applying to the securing of Postal Savings funds could not apply to the funds involved in this suit, first, because such funds were not Postal Savings funds even in the Panama Canal Zone, and, second, because even by implication the statutes in the United States relating to Postal Savings funds were never made to apply to the Panama Canal Zone.

The sole basis advanced in the answer to the bill of complaint and in the brief of appellants for urging that authority for requiring security for these deposits sufficient to bring this case under *City of Marion v. Sneed*, *supra*, and *O'Connor v. Rhodes*, *supra*, rests upon the theory that at least indirectly the provisions of the United States Postal Savings Act (39 U. S. Code, Section 759) has become a part of the law of the Panama Canal Zone. In other words, all of the long list of letters, executive orders, acts of the Isthmian Canal Commission, orders of the Secretary of War, etc., are sought to be traced back to the United States Postal Savings Act. Therefore, by seeking to trace through these various executive orders, acts of the Isthmian Canal Commission, orders of the Secretary of War, etc., etc., the effort is to make it appear that by implication at least the provisions of the Act of Congress known as the Postal Savings Act of the United States apply, or formerly applied, to the deposits here in controversy.

But analysis shows that the Postal Savings Act of the United States with its provision requiring the securing of Postal Savings funds never applied to the Panama Canal, and never applied to their funds.

A brief review of the Postal Savings situation in the Panama Canal Zone shows this to be true.

In the first place, the United States Postal Savings Act (Title 39, USCA, Sections 751-769, inclusive, first adopted in June, 1910) applies specifically and only to money received as "Postal Savings." Under this Act, individuals were entitled to open Postal Savings accounts in the various post offices of the United States and thereupon to receive pass books or certificates or cards or stamps evidencing such deposit. In other

words, under this system, the post offices in the United States acted as banks for those desiring to make postal savings. The entire system was placed under the control of a Board of Trustees made up of the Postmaster General, the Secretary of the Treasury, and the Attorney General of the United States. Under Section 759 of this Act "Postal Savings funds received under the provisions of this chapter" were to be deposited in banks in the United States in the general vicinity of the place where the deposits were made and the trustees of the postal deposit system were required to obtain security for such deposits by the delivery to them of certain specified types of bonds. The point to be emphasized about this Act is that it related only to "*Postal Savings funds.*" It had no relation to money order funds.

Apparently the effort is made in appellants' brief to leave the impression that this system in the United States was by implication or executive order, or otherwise, moved down to the Panama Canal Zone. This, however, is not the case.

On September 8, 1911, approximately one year after the adoption of the Postal Savings System in the United States, President Taft issued an executive order "by authority vested in me," whereby he set up a complete Postal Savings System for the Panama Canal Zone. A copy of this order is attached hereto in the appendix beginning at page 93. Section 1 of this order provided that "there is hereby established in the post-offices of the Canal Zone, a postal savings system, to be operated without the payment of interest on the deposits under such rules or regulations as may be now or hereafter adopted." The system set up was almost precisely the same (with one vital difference) as that already

existing in the United States. The order by its terms included all of its provisions and made no reference to the United States system. The provision with regard to the deposit of Panama Postal Savings funds was contained in Section 7, which provided that such funds "shall be deposited with the Treasurer of the Canal Zone under such regulations as *the Board of Trustees may prescribe.*" *This order contained no provisions for the deposit of such Canal Zone Postal Savings funds in any banks anywhere.* The Board of Trustees never, by regulation or otherwise, required the funds to be deposited in banks.

On September 5, 1914, which was before the opening of the deposit in question in the District National Bank of Washington, President Woodrow Wilson issued an executive order No. 2040 (copy included in the appendix beginning at page 95) specifically *repealing* President Taft's executive order of September 8, 1911, which is above referred to. *No other executive order, law or other official act, ever reestablished a Postal Savings System in the Panama Canal Zone. There being, after 1914, no Postal Savings System in the Panama Canal Zone, nothing contained in any order, or act could make the Postal Savings Law of the United States, with its provision regarding the deposit of Postal Savings funds in banks of the United States, apply to the Panama Canal Zone.*

By President Wilson's executive order of Sept. 5, 1914, just referred to, a different system was set up in the Panama Canal Zone. Section 2 of his order provided that "for the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, *money orders* may be issued in the Canal Zone payable to the purchaser at the office of issue, for which

no fee shall be charged." This order by its terms was to become effective October 1, 1914.

On October 22, 1916, President Wilson issued a further executive order No. 2479 (text printed in appendix beginning at page 96) providing that the "deposit money orders" issued by the Canal Zone Postal Service should bear interest at the rate of one-half of one percent for each period of three calendar months.

That the money deposited in the United States National banks, and particularly in the District National Bank, Washington, D. C., were moneys used to purchase such money orders (as distinguished from Postal Savings) needs no argument because it is admitted on pages 14 and 15 of the brief of appellants, wherein it is said, just after mentioning President Wilson's executive order of September 5, 1914:

"Thus, money orders issued for deposits were designated *deposit* money orders. It is important to observe that about 75 percent of the funds deposited in the District National Bank, which are here involved, consisted of moneys represented by such deposit money orders. About 25 percent consisted of moneys received for money orders."

In other words, appellants' own brief does not even claim that one penny of this money deposited in the District National Bank represented *Postal Savings money*.

Taking it as established, therefore, that the money in this suit consisted entirely of "money order funds" and further that neither impliedly nor by a delegation of legislative power were the provisions of the United States statutes regarding United States Postal Savings funds ever made to apply to Panama Canal Zone money order funds, it next becomes necessary to examine the

record to determine what, if any, authority aside from the U. S. Postal Savings Act existed for securing Panama Canal Zone money order funds.

Appellants' brief goes far beyond their answer and also beyond the record and relies largely upon partial quotations from circulars and letters which do not appear in the record, in addition to brief extracts from executive orders of the Presidents and acts of the Isthmian Canal Commission, which likewise do not appear in the record. Assuming for the moment that executive orders of the President of the United States are the sort of public documents of which the Court will take judicial notice, it is submitted that this is not true of regulations, circulars, letters, etc.

Examining appellants' answer (R. 12) in order to ascertain whence arose any alleged duty on the part of any officer of the Canal Zone to exact and require the pledge of securities to secure the deposits in question, the following averments of the answer apparently are the only ones thus relied upon:

- (a) That by the Panama Canal Act of June 28, 1902, and the supplementary Act of April 28, 1904, the President of the United States was given complete governmental control over the Canal Zone with power to legislate directly or by designated subordinates (R. 14);
- (b) That the President authorized the Secretary of War to exercise these powers on his behalf (R. 14);
- (c) That on September 2, 1904, the Secretary of War directed the Isthmian Canal Commission to establish a Postal Service in the Canal Zone which was established (R. 14);
- (d) That the Act of the Isthmian Canal Commission establishing said Postal Service provided that

it should be conducted, regulated and controlled by such of the laws, rules and regulations of the Postal Service of the United States as were not inapplicable to the conditions of law and fact existing in the Canal Zone and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission (R. 14);

- (e) That the laws of the United States enacted with reference to the *Postal Savings System* of the United States required that postal savings funds be deposited in solvent banks and that the Board of Trustees of the Postal Savings System be required to take from such depository banks such security as said Board may approve and deem sufficient to insure the safety and repayment of postal savings deposits on demand (R. 14);
- (f) That the provision requiring the Board of Trustees to require a pledge of securities for postal savings deposits was not inapplicable, but was applicable to deposit *money orders* issued in connection with the Canal Zone Postal Service and that it became incumbent upon the Secretary of War and those under him having control of Canal Zone money order funds to require security from depository banks before making deposits (R. 14);
- (g) That such provisions of the *postal savings laws* of the United States, applicable to the Canal Zone, and requiring security from depository banks, authorized the bank to give such security (R. 14);
- (h) That Section 2 of the Panama Canal Act of August 24, 1912, ratifying and confirming as valid and binding "all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government * * * of the Canal Zone," ratified and confirmed the actions of the Secretary of War in requiring the deposit of securities by a

depository bank to insure the prompt payment of moneys of the Canal Zone on deposit therein. (R. 14);

- (i) That in conformity with the orders of the President of October 22, 1916 and December 6, 1922 the Governor of The Panama Canal was authorized to prescribe detailed regulations to carry out the terms of the Presidential order, and that the Governor did on April 5, 1923, provide that:
“Postal savings, money order, clubhouse, and other trust and security funds received shall be remitted to depositories in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the Auditor.”

Thus, we see that by various steps, but without any reference to a specific or express Act of Congress authorizing the giving or requiring the taking of security for deposits of Canal Zone funds, appellants have attempted to overcome the interdictions of the decisions and the application of the legal principles announced therein in an attempt to create an authority upon which a legal and valid pledge may be predicated. The point attempted by appellants is to create a specific authority from Congress by referring to various acts, regulations, and promulgations of the President relative to the Canal Zone; but there being no basic act creating any authority in national banks to pledge their assets, or any duty imposed by Congress on the part of Canal Zone officers to require security for deposits of Canal Zone funds, there is no room for statutory construction nor any reason for adoption of these acts by reference in order to enlarge upon or explain the duties of the bank and the officers in connection with the transaction in question.

Claims with respect to three alleged sources of authority for securing these deposits remain to be discussed, namely,

A. Governor's Circular No. 660-61 of April 5, 1923.

Of all of the executive orders, circulars, acts of the Isthmian Canal Commission, etc., etc., described in appellants' brief, this is the only alleged document specifically mentioning the securing of Canal Zone money order funds. The part of this circular quoted in the appellants' answer and brief reads as follows:

"Postal savings, money order, clubhouse, and other trust and security funds received shall be remitted to depositories in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the Auditor."

It will be noted first that this order was issued, not by the President of the United States and not by the Isthmian Canal Commission, but was a mere routine circular issued by the Governor of the Panama Canal Zone and, second, that it was issued in 1923, whereas the deposits in the District National Bank were made in 1914. In other words, at the time when the deposits were made and the security deposited, there existed nowhere not even a regulation or circular of anyone requiring the securing of such deposits. Examination of the executive orders of the President of the United States with respect to the Panama Canal Zone, of the Treaties and Acts of Congress relating to the Panama Canal Zone, and of the laws of the Canal Zone enacted by the Isthmian Canal Commission shows that none of them contained any reference whatever to the securing of deposits made by the Panama Canal Zone or in

its behalf in national banks in the United States, or indeed in any banks. Furthermore, on June 19, 1934, there was approved by the Congress a "Canal Zone Act" containing in codified form "all the laws relating to or applying in the Canal Zone, except such general laws of the United States as relate to or apply in the Canal Zone." The preface to this Canal Zone Code states that "the material included in the code has its source in acts of Congress, in certain acts and ordinances of the former Isthmian Canal Commission which were ratified and confirmed as valid and binding by Congress in the Panama Canal Act of 1912, and, in a limited number of sections, in Executive orders of the President which were likewise ratified and confirmed by Congress." The appendix also contains in addition "treaties and general laws of the United States applicable in or relating to the Canal Zone or the Panama Canal." As stated in the preface "an attempt has been made to represent all general laws which are applicable, setting forth the text of the law in the cases wherein that course is warranted by the extent of the practical application of the law and in all other cases inserting an appropriate reference to the law under a proper heading."

An examination of this Canal Zone Code shows that it contains no provision whatever requiring the securing of Canal Zone funds, money order or otherwise, deposited in national banks of the United States.

It is submitted that a mere "circular" of the Governor of the Panama Canal Zone, vague in its terms, not approved specifically by the Secretary of War or the President of the United States, and issued approximately nine years after the funds in questions were deposited and secured, is not and cannot be such an

authority by implication, delegation or otherwise, as was contemplated by the Supreme Court and this Court in the *Pottorff*, *Sneeden* and *Rhodes* cases.

B. The Panama Canal Act of August 24, 1912.

Appellants urge in their brief (R. 14) that the Act of Congress approved August 24, 1912, 37 Stat. 560, in Section 2 ratified and confirmed as valid and binding "all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government * * * of the Canal Zone" and apparently argue that this Act had the effect of ratifying and confirming the actions of the Secretary of War in requiring the securing of these deposits. As stated above, the deposits in the District National Bank were not opened until 1914 and the order of the Governor of the Canal Zone ordering securing of deposits of Panama Canal Zone funds was not issued until April 5, 1923. Obviously, therefore, the Act of Congress of August 24, 1912, could not ratify or confirm an order which was not issued until years afterward. The Act of Congress of August 1912 did not pretend to confirm and ratify any action thereafter taken by officials connected with the Panama Canal Zone and did not have that effect.

C. The Acts of Congress of August 21, 1916 and of September 21, 1922.

The brief of appellants (p. 14) urges that Sections 6 and 7 of the Act of August 21, 1916, 39 Stat. 528, and Section 11 of the Act of Congress approved September 21, 1922 had the effect in some manner of ratifying and confirming the alleged action of Canal Zone officials in requiring the securing of these deposits.

The sections referred to of the Act of August 21, 1916, 39 Stat. 528, 48 USCA 1324, 1325, are as follows:

“Section 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.

“Section 7. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service.”

Section 11 of the Act approved September 21, 1922, 48 USCA 1324, is as follows:

“Deposit money orders issued in the Canal Zone in lieu of postal-savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding 3 per centum per annum.”

The only rules and regulations established by the President with respect to deposit money orders issued in the Canal Zone were contained in the President's executive order of September 5, 1914, providing in Section 2 that:

“For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged,”

and the President's executive order of October 22, 1916, providing that:

“deposit money orders issued by the Canal Zone Postal Service shall bear interest at the rate of one-half of one percentum for each period of three full calendar months, from August 21, 1916, or subsequent date of issue. Interest shall be payable when the order is paid but shall not accrue on any order for more than three years.”

The Acts of Congress referred to by appellants and quoted above, therefore, did nothing more than what they purported to do, namely, authorize the payment of interest on money order funds in the Panama Canal Zone and authorize the use of the interest derived from money order funds in the payment of such interest to purchasers of money orders. Even by inference such Acts of Congress do not purport to authorize the securing of deposits in United States banks of money order funds.

D. The Act of Congress of February 16, 1933.

Appellants dwell with particular emphasis on the Act of Congress approved February 16, 1933, 48 USCA 1323 (a), 47 Stat. 812, reading as follows:

“The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such

service: *Provided, however,* That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized."

It is urged that this statute is in effect a ratification of the action and policy and practice of the Secretary of War in requiring security for money order funds and in support of this position, there is cited *McNair, Receiver, v. Knott, Treasurer*, United States Supreme Court, decided December 13, 1937.

Prior to 1930, national banks did not have the authority or power to secure the deposits of a State, or political sub-division thereof, but by the Act approved June 25, 1930, in the form of a specific amendment to Section 90, Title 12, Congress provided:

"Any association may, upon the deposit with it of public money of a State or any political sub-division thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

At the time this Act was passed, the State of Florida already had a law authorizing state banks to secure public deposits and the First National Bank of Perry, Florida, which was closed subsequent to the passage of the amendment, had secured a deposit made by the officials of a Florida county.

The Supreme Court in the opinion by Mr. Justice Black in the *McNair v. Knott* case decided that the specific Act of Congress of June 25, 1930 acted as a ratification of the previous pledge agreement, on the

ground that after the passage of the 1930 Act, the bank, still a going concern, could have withdrawn the pledge, and that since the pledge was not withdrawn, it was made under the new Act. That case, however, is not in point and is not decisive of this case involving Panama Canal funds for two reasons.

First, the amendment to Section 90 of Title 12 passed by Congress in 1930 specifically amended existing law and specifically authorized the sort of pledge involved in *McNair v. Knott*, whereas the Act here relied on, that is the Act approved February 16, 1933, made no reference whatever to the securing of deposits. For a specific Act of Congress to be amended by such vague implication would go far beyond any rules of statutory construction. Obviously, if Congress had desired to authorize the securing of Panama Canal funds, as it had previously authorized the securing of United States Postal Savings funds and other specific funds, it could and would have done so by specific language.

Second, the Act approved February 16, 1933 only made applicable to the Postal Service of the Canal Zone "such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone." There were then and there are now no "laws, rules, and regulations of the Postal Service of the United States" requiring the securing of money order funds. The only way in which money order funds in the United States may be deposited and secured is through Section 90, Title 12, USCA, that is, by the designation of banks for the purpose by the Secretary of the Treasury, and the requiring of security by the Secretary of the Treasury from such banks. In other words, if even by inference, the Act of February 16, 1933, required the securing of Panama

Canal money order funds, then the law required that the securing of such funds should be accomplished in the manner prescribed by Section 90, Title 12, U.S.C.A., and it is not claimed in the answer of appellants that such requirements were met, because, as previously stated, it is admitted in paragraph 9 of the answer (R. 20) that the bank was not designated by the Secretary of the Treasury under regulations prescribed by him, and that the deposit was not made by the Secretary of the Treasury, and that the giving of security for the deposit was not required by the Secretary of the Treasury. All of these things were done by the Secretary of War.

Examining appellants' case in the light of the foregoing analysis, it is obvious that the predicate upon which appellants seek to base, and the sources from which they seek to create, the authority of the bank to pledge its assets to secure the deposits in question are fatally defective in that, first, inasmuch as Congress never authorized or required the pledge of assets in question as security for deposits of Canal Zone funds, there is no base or predicate for appellants' argument, and second, the foundation of the structure of appellants' theory was built up by a series of steps by which the Court is left to infer that Congress, although not saying so, intended that the pledge of securities should be required. Appellants attempt to create such intention of Congress to create an authority or requirement that depository banks should give security for Canal Zone funds, by referring to the historical development of the construction and regulation of the Canal and Canal Zone. This falls far short of an Act of Congress requiring that Canal Zone funds deposited in banks in the United States be secured by a pledge of the bank's

assets which, had such authority existed, would have given implied authority to the District National Bank to give the disputed pledge. In this situation, it is clear that the law failed to provide national banks and this bank with power to make the pledge either by direction or by requirement. There being no such authority from Congress, this Court is powerless to create one, and its duty is confined to an application and construction of the law as it exists.

Since appellants point us to no authority, *and there is none*, authorizing a national bank to pledge its assets to secure deposits of Canal Zone funds, and since they point us to no statute, *and there is none*, making it the duty of officers of the Canal Zone to exact security for safe keeping of funds deposited in national banks, and since the Secretary of War was entirely without authority of any kind to enter into the pledge contract in question, we arrive at the inescapable conclusion that the pledging of assets by the District National Bank at the instance of the Secretary of War to the representative of the Canal Zone was illegal and void. This being so, the inevitable deduction is that the Receiver, as the bank's representative in insolvency, has not only the right, but the duty to bring suit for the recovery of the bank's assets illegally pledged, or their proceeds, and that such suit can be maintained.

II.**Estoppel.****A. Appellee Receiver is not Estopped From Recovering Back the Pledged Assets, or Their Proceeds, Even Though the Secretary of the Treasury and the Comptroller Did Approve the Pledge.**

In their brief (pages 23 to 26) appellants make the point that the giving of security for Canal Zone deposits was sanctioned and approved by the Secretary of the Treasury and the Comptroller of the Currency. In their answer (R. 15) they state that the action of the Secretary of War and his subordinates in negotiating for the giving of security to safeguard deposits was the subject of correspondence between the Secretary of War, the Panama Canal and the Treasury Department, by reason of which the contract with the instant bank was recommended by the Comptroller of the Currency and the Secretary of the Treasury. Appellants then refer to various correspondence and negotiations between the Isthmian Canal Commission and the Secretary of the Treasury relating to depositing funds in various banks. This correspondence was not referred to or set forth in the answer and hence, not being in the record, it can hardly be considered as a proper basis for argument or discussion in the brief. However, the most that can be said for this correspondence and negotiation is that the Secretary of War and the Comptroller of the Currency were agreeable to the execution of a pledge contract whereby Canal Zone funds would be deposited in the District National Bank. Therefore, the purpose of the above referred to averments in the answer and the correspondence and negotiation referred to in the brief is to show an approval by the

Comptroller and the Secretary of the Treasury of the pledging of assets by the District National Bank to secure deposits of Canal Zone funds.

So that the question presented is whether the approval by the executive officers of the Government in question of a void pledge of assets can give legality to such unauthorized and void act. In their brief (p. 26) appellants refer to the fact that the Receiver was not justified in bringing this suit because the Comptroller and the Secretary of the Treasury had recommended the pledge of assets and had sanctioned it and that their action in this connection had remained unquestioned for more than fifteen years. Appellants fail to state the legal conclusion which they deem to have flowed from this conduct, but it is assumed that the point of law which appellants desire to bring to the Court is that by reason of these facts the Receiver is estopped from prosecuting this action for the recovery of the illegally pledged securities or their proceeds.

This argument is completely answered by the Supreme Court in the *Pottorff* case where the Court said:

“The receiver is not *estopped* to deny the validity of the pledge. * * * It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised.” (p. 260).

In the case of *Granzow v. Villiage of Lyons*, 89 Fed. (2) 83 (CCA 7) the receiver of a national bank sued to recover from the City the proceeds received from the sale of certain assets of the bank which had been pledged to secure deposits of Municipal funds. The

City moved to dismiss, which motion was granted and this action of the trial Court was reversed upon appeal. It appeared that the receiver and the Comptroller approved the sale of the collateral and in this connection the Court stated on page 84:

“In due course of administration, both the receiver and the municipality, under a misapprehension of the law, agreed that the municipality might sell the collateral and apply the proceeds of the sale upon the debt. The Comptroller of the Currency approved this agreement, subject to approval by the District Court.”

After the sale the *Sneeden* and *Pottorff* cases were decided and the suit was instituted after these decisions and in this connection the Court said at page 85;

“Some time thereafter the parties awoke to the fact that these transactions had taken place under a mutually mistaken view of the law.”

So that so far as the question of estoppel is concerned the facts in that case are substantially identical with the facts in the instant case. Upon this question the Court said, pages 85 and 86:

“But it is said that the preferential payments had been made at the instance and with the approval of the comptroller. This in no wise alters the situation. In *Wisconsin Central R. R. v. United States*, supra, the Supreme Court held the Postmaster General included within the class of those whose wrongful payment may be recovered. There is no reason why the comptroller should have any greater power to bind the government by approving a payment contrary to law. Such was the reasoning of the Court in *O'Connor v. Rhodes*, 65 App. D. C. 21, 79 Fed. (2) 146. There the previous payments were recovered, although they had been made at the instance and with the

approval of the comptroller. The Supreme Court affirmed in 297 U. S. 383, 56 S. Ct. 517, 80 L. Ed. 733. A similar recovery was allowed in *Mays v. Wilkinson* (D. C) 12 F. Supp. 350. There was and there could have been no estoppel as to either the receiver or the comptroller which would work a binding effect upon the payment of money made by them as United States officers under misapprehension of the law."

In the case of *Leonard v. Gage and Elliott, Receivers* (not yet reported) No. 4219 (CCA 4) opinion January 4, 1938, the receivers of an insolvent national bank sought to recover the proceeds of bonds which had been pledged by the bank to secure deposits of receivers of state banks. At the time of suspension of the state bank a ruling had been requested from the Comptroller as to whether the receiver of a closed national bank would contest a pledge of assets made by the national bank to secure the deposits in question. A letter was received from the Deputy Comptroller of the Currency in which he stated that he believed as a matter of policy the power of national banks to secure deposits, under the circumstances, should not be questioned and that the Comptroller's office "did not disapprove this particular pledge." The trial Court held that the deposits of state bank receivers were not deposits of public moneys and that national bank receivers were not estopped from claiming the proceeds of the assets sold in the circumstances of the case. The Court held, however, that the deposits were impressed with constructive trusts based upon special circumstances of misconduct and the petitions were denied. Upon appeal this judgment of the trial Court was reversed. The Court held that a pledge of securities to secure deposits was warranted only in the specific cases provided for by

Federal statutes. The Court referred to the *Sneeden*, *Pottorff* and *Rhodes* cases and said:

“Since, as pointed out in the *Pottorff* case, *supra*, neither the bank nor the receiver can be held estopped to deny the validity of the pledge because of its ultra vires character, it is immaterial that the pledge preceded the deposits or that funds of the bank to the amount of the deposits were used to purchase the securities pledged. See *Granzow v. Village of Lyons* (C. C. A. 7th) 89 F. (2d) 83. And it is perfectly clear that the powers of the national banks under the act of Congress creating them could not be enlarged, either by the order of the District Judge specifying the kinds of security which the receivers might accept for deposits, or by the letter of the Deputy Comptroller of the Currency to the effect that the Comptroller’s office would not disapprove pledges which it was beyond the statutory powers of the banks to make. *Granzow v. Village of Lyons, supra.*”

In *Mays v. Wilkinson*, 12 Fed. Supp. 350, suit was brought by the plaintiff to recover securities deposited with the bank for safe keeping prior to suspension. The bank, without knowledge of the plaintiff, pledged these bonds to secure deposits of moneys of Creek County. The Court said upon the question of estoppel, at page 355:

“In rendering judgment in favor of the receiver against the county commissioners and county treasurer of Creek county, this court does so with great reluctance and only because of the declared law as announced by the Supreme Court in *Marion v. Sneeden, supra*. It seems rather strange, however, that the Comptroller of the Currency, all these years, should have permitted the national banks to take advantage of a custom and practice of receiving public funds and pledging assets of

national banks to secure the same and thus have the benefit of the public funds so deposited, without incurring any liability whatever against the pledged assets, and the court is following what he considers the cold letter of the law and not his sympathies, nor what he conceives to be just and equitable between the receiver and the county authorities of Creek county."

In *Ross v. Lee*, 15 Fed. Supp. 972, there was involved a pledge of assets by a national bank to secure deposits of school funds. Upon the question of estoppel the Court said at page 974:

"The subsequent acts of the receiver are likewise ineffectual to vitalize the pledge by ratification, or to create an estoppel against the general creditors of the bank, even if any rights could arise on an ultra vires contract by reason of performance. Even though a bank by its acts might estop itself from asserting a lack of power in these circumstances, a receiver appointed upon its insolvency is free to challenge the validity of the pledge. Texas & Pacific Ry. Co. v. Pottorff, 291 U. S. 245, 54 S. Ct. 416, 78 L. Ed. 777."

In *Adams v. Cribbis*, 17 Fed. Supp. 723, suit was brought by the receiver of an insolvent national bank to recover assets pledged to secure deposits of the City of Idaho Springs, Colorado. A stipulation was entered into whereby the pledged securities were delivered for sale under instructions from the Comptroller of the Currency. From this fact the inference was attempted to be made that the receiver was estopped from bringing a suit to recover back the assets or their proceeds. The Court said at page 725:

"It follows that neither the Comptroller of the Currency, nor his receiver, had any authority to

in any way waive the statutory prohibition; that the defendants were charged with knowledge of the law; and that the stipulation, Exhibit 1 (which we note in passing was not made between the parties to this suit), is wholly null and void, in so far as the bank or its receiver is concerned.”

In *Rusch v. Baer*, 18 Fed. Supp. 732, suit was brought by the receiver of a national bank to recover payments made to the township Treasurer and the school trustees to release assets of the bank pledged to secure deposits of these funds. Upon the question of estoppel the Court said at pages 733 and 734:

“Can these preferential payments be recovered back? On the part of the defendants it is contended that the preferential payments cannot be recovered back because the ultra vires and illegal contract has been fully executed. In substance, this contention is that the Comptroller and the receiver ratified the illegal act of the bank; that, having ratified the contract, the plaintiff is now estopped to assert its invalidity. This contention ignores the proposition that the prohibition is statutory. Neither the bank nor the receiver had any power to waive the statutory prohibition.”

It should be noted that in the case of *O'Connor v. Rhodes, supra*, this Court had this same question under consideration. In the per curiam opinion of the Court rendered in connection with the motion for reargument and stay of mandate this Court pointed out that there was involved the question that the preferential payments were made at the instance and with the approval of the Comptroller and the receiver (65 App. D. C. at page 28).

Notwithstanding this fact, this Court held that the trial Court should exercise its discretion as to whether

the depositors' suit should be stayed or the Comptroller's suit should proceed.

Any argument by the appellants that the receiver is estopped to void the pledges involved in this case would sustain by indirection an ultra vires exercise of power by national banks, contrary to the rules of law laid down in the cases above cited. If from the correspondence and negotiations referred to by appellants in their answer and brief, it should appear that the Comptroller or the Secretary acted upon his construction of the law, it certainly appears that in the light of the subsequent decisions his construction was erroneous. A public officer's misconception of the law can not change it and cannot bind his successors in their subsequent conduct. *Wilson & Company v. U. S.*, 245 U. S. 24; *Providence Corporation v. Downey Corporation*, 294 Fed. 641. As a matter of fact, the bank had no right to rely upon the public official's opinion as to what the law might be. *Whitesides v. U. S.*, 93 U. S. 247. As was said in *Schaffer v. Helvering*, 83 Fed. (2) 317 at page 320:

“Whoever deals with government does so with notice that no agent can, by neglect or acquiescence, commit it to an erroneous interpretation of the law.”

It is clear, therefore, from these recent authorities that the defense of estoppel cannot avail the appellants as a defense. The pledges having been made in violation of law and void *ab initio*, cannot assume a status or complexion of legality by any act of acquiescence, sanction or ratification on the part of the Comptroller, the Secretary of the Treasury, the conservators or the receivers. These officers, all being officers and agents of the United States, cannot be estopped from assail-

ing in these proceedings the validity of these pledges, and all acts done thereunder.

On page 26 of their brief appellants make the suggestion that the construction given to legislative acts by an agency charged with the execution thereof, followed for a considerable period of time, will be deemed persuasive. In other words, appellants contend that executive construction of legislative acts is the equivalent of a grant of corporate power by Congress and consequently gives legality to an unauthorized and void pledge of the assets of a national bank. This argument overlooks entirely the important distinction between the absence of legislation, and executive construction of legislation where it exists. In the instant case there was no executive construction of legislative acts, but merely an assumption by executive officials of the existence of a power which had not been conferred and did not exist. The Supreme Court of the United States answered this contention completely in the *Sneeden* case when it said on page 269:

“In some States national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the State or of a political subdivision thereof; *comptrollers of the currency knew that this was being done; and they assumed that the banks had the power so to do. But the assumption was erroneous.* The contention that such power is generally necessary in the business of deposit banking has not been sustained.”

Referring again to the correspondence alluded to on pages 24 and 25 of appellants' brief between the Secretary of the Treasury and the Secretary of War, appellants (page 26) conclude that this correspondence was tantamount to, or a substantial compliance with,

the statute (Section 90, Title 12, U. S. C.) authorizing the Secretary of the Treasury to designate national banks as depositories of public moneys. This contention entirely ignores the holding of this Court in *O'Connor v. Rhodes*, *supra* where this Court said on pages 149 and 150:

“We take the Pottorff and Sneed Cases to hold that under the national banking laws a national bank has no power to pledge its assets to secure a deposit, private or public, unless it is authorized or required to do so by an appropriate act of Congress. If we are correct in giving the decisions this interpretation, it follows that we must have recourse to the statutes to answer the question.

“Rev. St. Sec. 5153 (Act of June 3, 1864, c. 106, Sec. 45; 13 Stat. 99, as amended, 12 USCA Sec. 90) provides: ‘All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositories of public money, under such regulations as may be prescribed by the Secretary. * * * The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of public money deposited with them. * * *’

“In *Branch v. United States*, 12 Ct. Cl. 281, affirmed 100 U. S. 673, 25 L. Ed. 759, it is said that the act of the Secretary in designating a national bank as a depository of public money does not change its character or organization; that it still retains its identity as a national bank, and does not become the *custodian* of public money, but the *debtor* of the United States, precisely as in the case of other depositors. If security be not taken as the statute permits, the claim of the United States is on a parity with the claims of private

creditors. *Cook County Bank v. United States*, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537. And in the case of *Coudert v. United States*, 175 U. S. 178, 20 S. Ct. 56, 44 L. Ed. 122, it was said that this section (5153) has relation only to public money of the United States. In that case money derived from the sale of a vessel captured during the war between the states as a blockade runner, and deposited by the marshal to await the order of the court as to its disposition, was held not public money of the United States. Public moneys were defined to be the revenues of the United States from all sources covered into the Treasury.

“And in *Marion v. Sneed*, supra, the Supreme Court specifically held that Rev. St. Sec. 5153 did not confer or imply the power to pledge assets to secure public deposits, except those made under the provisions of that section by the Secretary of the Treasury of the United States. * * *

“There is nothing to show that the depository bank was designated by the Secretary of the Treasury, under regulations prescribed by himself, to receive the deposits or that he exacted the pledges which are the subject matter of the suit. On the other hand, the statement is that the pledges were in each case taken (a) by the Comptroller, (b) by the Fleet Corporation, and (c) by the Alien Property Custodian.

“In this aspect we think the point is broader than the question whether the money is public money, and embraces also the further question whether the pledges (except in the case of the Comptroller, which we think is controlled by another act) were taken in accordance with the provisions of Rev. St. Sec. 5153. For, as we have seen, when national banks are made depositories of public money, it is the duty of the *Secretary of the Treasury* to require them to give satisfactory security by deposit of bonds, etc., and when

this is not done the Government occupies no higher status than a private depositor. *Cook County Bank Case*, *supra*. The duty imposed on the Secretary, as we think, is personal and results from the statute we have been discussing, and that Congress meant its language and provisions to be taken literally follows, we think, from the fact that by later acts, to which we shall now refer, Congress, to cover the cases of deposits of federal funds made by others than the Secretary of the Treasury, has specifically provided for such cases by appropriate statutes.

“Thus, by Act of July 1, 1898 (Bankruptcy Act, Sec. 50 [11 USCA Sec. 78]), Congress directed the courts to require bonds to be executed to the United States by all banking institutions in which bankruptcy funds are deposited; and by Act of March 3, 1911 (36 Stat. 1070, Sec. 17 [25 USCA Sec. 156]), directed that the Secretary of the Interior take from all banks in which any Indian moneys are deposited collateral security, etc. And by Act of May 15, 1916 (39 Stat. 121 [12 USCA Sec. 192]), declared that the Comptroller of the Currency shall take security for the funds of insolvent national banks deposited by him; and by Act of May 18, 1916 (39 Stat. 159, Sec. 2 [39 USCA Sec. 759]), required the board of trustees of postal savings funds to deposit in banks and to take security for their safekeeping. And by Act of September 24, 1917 (40 Stat. 291, Sec. 8, as amended [31 USCA Sec. 771]), authorized the Secretary of the Treasury to require security for deposits made of the proceeds from the sale of public bonds. See note 11 to *Pottorff Case*.

“These several acts designed to enlarge and extend the right of banks to pledge assets, followed by the Act of June 25, 1930 (46 Stat. 809, [12 USCA Sec. 90]), authorizing security for the payment by national banks of public moneys of states

and counties, indicate that Congress recognized that only through the enactment of such statutes would the pledge to secure the particular deposits be valid and enforceable. The purpose of the acts, as we have said, was to enlarge the powers of national banks in relation to the subject-matter covered by the Acts, and the authority in the acts to the depositors to demand the pledge carried with it, as was said by Mr. Justice Brandeis in the Pottorff Case, like authority on the part of the banks to make the pledge. *Maryland Casualty Co. v. Board of Commissioners*, 128 Okl. 58, 260 P. 1112. And so we reach the further conclusion that wherever Congress by express authority directs the custodian of federal funds, without regard to whether they be technically public or private funds, to deposit them in a national bank and to exact security from the bank for their repayment, the duty thus imposed on the custodian authorizes the bank to give the security or make the pledge."

The views above expressed by this Court in its construction of the decisions of the Secretary of the Treasury with references to compliance with the provisions of the statute (Section 90, Title 12, USC) seem to have been accepted by the Supreme Court of the United States since that Court denied petitions for certiorari in the case of *O'Connor v. Rhodes* when sought by the Merchant Fleet Corporation and the Alien Property Custodian. In view of these facts, it seems that a further discussion of this point is not only unnecessary but inappropriate.

So that it is apparent that whatever may have transpired by way of correspondence between the Secretary of War, the Secretary of the Treasury and the Comptroller, it is clear from the answer of defendants

themselves (R. 20) that the action of the Secretary of the Treasury was merely advisory and personal and did not constitute designation of the banks as depositories under Section 90, Title 12, USCA. Anything short of such action under the statute was of no effect. It is entirely clear that at most the Secretary of War acted alone about these pledges and merely asked the advice of the Secretary of the Treasury. The Secretary of War did not pretend then to act under the statute. The present Secretary of War does not so claim now.

Any previous erroneous expressions of opinion which the Comptroller and the Secretary of the Treasury may have volunteered must yield to the decisions of this Court, and the Comptroller has no alternative but to prosecute this suit without regard to any prior errors of law that may have been made.

B. Knowledge and Recognition of the Practice of Pledging Assets by National Banks to Secure Similar Deposits Could not Work an Estoppel Upon Appellee Receiver From Receiving Back the Pledged Assets or Their Proceeds.

The third part of appellant's brief (pages 27 to 33 inclusive) advances the contention that custom and usage based upon a known practice of pledging securities to safeguard deposits of public officers creates an estoppel, and as such constitutes authority for the illegal pledge. Inasmuch as the pledge here made was absolutely void (see cases under Point 1, page 6 of this brief) it can hardly be argued that a practice establishing custom and usage could legalize a void act, and this especially in the face of Section 192, Title 12 USCA, which requires a ratable distribution of an in-

solvent bank's assets among its creditors, and Section 91, Title 12 USCA, which prohibits preferential transfer or distribution of the assets of national banks, which two sections were construed in the *Pottorff* case as “*designed to ensure, in case of disaster, uniformity in the treatment of depositors and ratable distribution of assets.*”

The general proposition is well settled that custom and usage can not create or establish a contract where none exists.

Tilley v. Chicago, 103 U. S. 155;
National Savings Bank v. Ward, 100 U. S. 195;
Barnard v. Kellog, 10 Wall. 390;
Thompson v. Riggs, 5 Wallace 663;

As was said in *First National Bank v. Burkhardt*, 100 U. S. 686:

“Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law.”

But this question has arisen in cases directly in point where receivers of failed national banks have sought to recover assets pledged to secure public deposits; and the Courts have refused to permit a defense based upon custom and usage. For instance, in the case of *Mays v. Wilkinson*, *supra*, the Court said upon this question:

“It seems rather strange, however, that the Comptroller of the Currency all these years, should have permitted the national banks to take advantage of a *custom and practice* of receiving public funds and pledging assets of national banks to secure the same and thus have the benefit of the public funds so deposited, without incurring any liability

whatever against the pledged assets, and the court is following what he considers the cold letter of the law (allowing recovery by the Receiver)
* * * * *

On this question Mr. Justice Wilson of the District Court of the United States for the Northern District of Texas, Fort Worth Division, in *Maxwell, et al and Porter, et al v. Tarrant County Water Control and Improvement District*, No. 650 and 645 in Equity held:

“The practice of securing public deposits by pledges of assets was not necessary nor incidental to the business of such Banks. Generally, the Supreme Court found such practice was not customary, and while the evidence in the present case is contrary to that finding, *it is thought that custom will not vitalize void transactions.* The authorities cited leave no doubt that attempted pledges for such purposes were void. *Texas & Pac. Ry. v. Pottorff, supra; Marion v. Sneed, supra; Kavanaugh v. Fash, supra.* No rights arise on an ultra vires contract even though the contract has been performed and consequently estoppel is not a defense here. What a corporation cannot bind itself to do, the courts will not compel.”

In a companion case known as *McCamey, et al v. City of Fort Worth*, No. 651, the same Court said:

“The City by way of defense, urges the following:

“First: The Bank had power to pledge its assets to secure public deposits; such practice was customary and not against public policy and the contract therefore was valid and binding; * * *.”

“Of these points, the First, Third, Fourth, Fifth and Seventh were discussed in *Porter et al. v.*

Water District. The First, Second and Fourth points are overruled on the authority of *Cook County National Bank v. U. S.*, 107 U. S. 448; *Texas & Pacific Ry. v. Pottorff*, 291 U. S. 245; *Marion v. Sneed*, 291 U. S. 262; *Lewis v. Fidelity & Deposit Co.*, 292 U. S. 559; *Kavanaugh v. Fash*, 74 Fed. (2) 435; *Utter v. Eckerson*, 78 Fed. (2) 307; *California National Bank v. Kennedy*, 167 U. S. 370."

Upon the appeal of the case last above mentioned the point was squarely presented to the United States Court of Appeals for the Fifth Circuit in *City of Fort Worth v. McCamey*, No. 8566, decided December 16, 1937 which is an appeal from the decision of Mr. Justice Wilson above referred to. The Court said:

"On July 19, 1930, the Comptroller of the Currency, in a carefully reasoned letter, instructed the receiver that the pledge of the securities was valid and to be respected, notwithstanding decisions to the contrary effect by the Texas Commission of Appeals in *Foster v. City of Longview*, . . . Tex . . . , 26 S. W. (2) 1059, and *Austin, Banking Commissioner, v. Lamar County*, . . . Tex . . . , 26 S. W. (2) 1062. That his conclusion was erroneous is established by *Sneed v. City of Marion*, 291 U. S. 262, and *Lewis v. Fidelity & Deposit Co.*, 292 U. S. 559, decided in 1934. But it is put forward as binding on the bank, its shareholders and depositors on the authority of such cases as *Liberty National Bank v. McIntosh, Comptroller*, 16 Fed. (2) 906; *Kennedy v. Gibson*, 8 Wall. 498; *Bushnell v. Leland*, 164 U. S. 684. * * * * *
If the Comptroller makes a gross error either in ordering the receiver to abandon an asset or in allowing a secured or unsecured claim, we think that those interested in the assets are not to be held without remedy."

“On the merits the Court found that the pledge by the Bank of its securities to obtain this deposit of public money was according to the practice of banks in Texas, was known to the Comptroller and acquiesced in by him. The Comptroller said as much in his decision not to sue the City, and in his testimony. There is not doubt of the good faith of the pledge and that all parties thought it valid. The case is one of great hardship, but we must hold the invalidity of the pledge settled by what was said in the cases of *Sneeden v. City of Marion*, 291 U. S. 262, and *Lewis v. Fidelity & Deposit Co.*, 292 U. S. 559. These cases assert that prior to the Act of June 25, 1930, a national bank was without power to pledge its assets to secure general deposits of public money, irrespective of what State banks could or did do. See also *Webb v. American Surety Co.*, 88 Fed. (2) 171; *Granzow v. Village of Lyons*, 89 F. (2) 83; *Collins v. School District*, 72 Fed. (2) 339; *Utter v. Eckerson*, 78 Fed. (2) 307.”

The point made by appellants of estoppel based upon custom, and usage of a recognized practice, is to some extent interwoven with the doctrine of sanction or approval on the part of the Comptroller, discussed in Part I above. This contention is answered by the opinion of the Circuit Court of Appeals for the Fourth Circuit in *Leonard v. Gage, supra*, where the Court said:

“And it is perfectly clear that the powers of the national banks under the act of Congress creating them could not be enlarged, either by the order of the District Judge specifying the kinds of security which the receivers might accept for deposits, or by the letter of the Deputy Comptroller of the Currency to the effect that the Comptroller’s office would not disapprove pledges which it

was beyond the statutory powers of the banks to make.”

It is clear from the above authorities that the custom of banks to pledge their assets to secure deposits, or any usage growing out of said custom and practice of pledging assets to secure deposits of this kind, has been wholly set aside by the *Pottorff*, *Sneeden* and *Rhodes* cases; and notwithstanding the fact that such custom and usage and practice of the banks was recognized and acquiesced in by the Comptroller, nevertheless, it cannot avail as an estoppel against the receiver's right of action to recover back the illegally pledged assets or their proceeds against the contention of appellants.

C. Approval of the Sale of the Pledged Assets by the Comptroller and the Bank's Conservator Could not Estop Appellee Receiver From Recovering Back the Pledged Assets or Their Proceeds.

The point raised by the Fourth part of appellants' brief (pages 33 to 41 inclusive) is that the receiver is estopped from pursuing this action to recover back the illegally pledged assets or their proceeds because the bonds were sold to the Hamilton National Bank by virtue of which two deposit accounts of the full amount of the Canal Zone deposit were set up in that bank and that this sale was approved by the then Supreme Court of the District of Columbia on September 7, 1933; and that under date of September 28, 1933 the Deputy Comptroller of the Currency wrote the conservator authorizing the delivery of these assets to the Hamilton National Bank provided they should be immediately repledged to secure deposits of Canal Zone funds. In

other words, appellants make the point that the sale of the pledged bonds was made with the approval of the Comptroller of the Currency and of the Court, and that by reason thereof the receiver is now estopped to bring this action. This point has been before the Court several times and the decisions are uniformly against appellants' contention. In the case of *Granzow v. Village of Lyons, supra*, the receiver and the Comptroller had approved the sale of the collateral but the Court held:

“In due course of administration, both the receiver and the municipality, under a misapprehension of the law, agreed that the municipality might sell the collateral and apply the proceeds of the sale upon the debt. The Comptroller of the Currency approved this agreement, subject to approval by the District Court * * * *. There was and there could have been no estoppel as to either the receiver or the Comptroller which would work a binding effect upon the payment of money made by them as United States officers under misapprehension of the law.”

In *Leonard v. Gage, supra*, the Deputy Comptroller of the Currency had written a letter in which he stated that the Comptroller's office would not disapprove a pledge of assets to secure deposits of receivers of state banks in national banks. The Court held that the bank receivers were not estopped from claiming back the assets sold or their proceeds.

Likewise, in *Adams v. Cribbis, supra*, it appeared that the Comptroller of the Currency had authorized a sale of the pledged securities. The Court held that the receiver was not estopped from bringing a suit to recover back the assets or their proceeds, since “it follows that neither the Comptroller of the Currency nor

his receiver had any authority to in any way waive the statutory prohibition." And in *Rusch v. Baer, supra*, the Court held that since neither the bank nor the receiver had any power to waive the statutory prohibition the receiver was not estopped to recover back the preferential payments.

The Court in *Maxwell v. Tarrant County Water Control, etc., supra*, said:

"Moreover, it is said, the Comptroller of the Currency with full understanding authorized and ratified all the transactions above detailed and his authorization and ratification is not only conclusive fact finding but assumes for present purposes res adjudicata finality behind which this Court should not go. These contentions cannot be sustained."

It should also be noted that in the case of *O'Connor v. Rhodes*, this Court had the same question under consideration, that the preferential payments to the Merchant Fleet and the Alien Property Custodian were made at the instance and with the approval of the Comptroller and receiver. This Court held that notwithstanding such approval, the depositors in their suit, or the Comptroller in his suit to recover back the illegally pledged assets, or their proceeds, whichever action might be permitted to proceed within the discretion of the trial Court, had the right to bring and maintain such suit.

If it were argued that the payments in question were voluntary payments made under a mistake of law which could not be recovered, that contention would be completely answered by the opinion of the Court in *Hood v. Hardesty*, 4199, (CCA 4) decided January 4, 1938 where the Court said:

“On the second question, the position of defendant is that there was a voluntary payment of defendant’s deposit under mistake of law, and that payment so made cannot be recovered. There are two answers to this: first, that the receiver of a national bank is an administrative officer of the United States and is not bound by the rule precluding the recovery of money voluntarily paid under mistake of law; second, that to permit the assets of the failed national bank to be thus applied in extinguishment of unsecured claims for deposits would contravene the federal statutes forbidding preferences to creditors and requiring the equal and ratable distribution of assets. 12 USCA 91 and 194. This matter has been fully discussed in the case of *Leonard et al v. Elliott et al.*, this day decided, and what is there said need not be here repeated.”

Although appellants have not raised the point directly some inference may be drawn from their argument to the effect that since the pledge has been executed by a sale of the bonds, the ultra vires pledge cannot be attacked in this action. In *Baldwin v. The Chase National Bank* (D. C. N. Y. 1936) 16 Fed. Supp. 918, Judge Knox conclusively disposes of this argument. In that case a national bank had pledged bonds illegally to secure a deposit made with it by the Secretary of War on behalf of the Philippine Islands. After the national bank failed the Secretary of War sold the bonds so pledged and deposited the proceeds of such sale with the defendant Chase National Bank. The plaintiff, who was the receiver of the national bank, sued the Chase National Bank to recover the proceeds of sale of the pledged bonds. Among other things the defendant Chase National Bank submitted that since the bonds had been sold, the pledge, although

ultra vires, had been executed and could not thereafter be set aside. The Court held that the complete want of power to make the pledge carried with it the incapacity to authorize a sale by anyone for the purpose of “*executing*” the transaction, and that the act of the Secretary of War in attempting to execute the contract by selling the securities under authority which he lacked, was merely an abortive effort to transform the attempt into an accomplished fact. To the same effect see:

Queenan v. Mays, supra;
Granzow v. Village of Lyons, supra;
Adams v. Cribbis, supra;
Rusch v. Baer, supra.

It is our contention, therefore, that the approval by the Comptroller and the conservator of an act already void, or the attempted ratification of such a void pledge by those officials, could not estop or in any wise militate against the right of the receiver, standing in place of the bank and acting for the creditors, to set aside such illegal pledge and recover the proceeds of the pledged assets sold.

III.

The United States is not an Indispensable Party to the Suit.

The contention that the United States is an indispensable party to this suit, which is urged by appellants as additional grounds for dismissing the action, is predicated upon the theory that the repayment of deposit money order and money order funds of the Canal Zone was guaranteed by the United States because Congress in the enactment of the Postal Savings

System Act pledged the faith of the United States to the payment of the deposits made thereunder and this latter Act was made applicable to the Canal Zone.

That the contention is without merit is obvious from an examination of the issues here involved. This action is brought to recover the proceeds of trust assets of the bank wrongfully withheld by appellants. In a suit to recover the bank's assets the source and character of the funds deposited in the bank is immaterial. However, the record discloses that the deposits in question were not revenues of the United States nor were they public monies of the United States, but were composed of funds with which residents of the Canal Zone purchased deposit money orders and money orders of the Postal System of the Canal Zone. Further, the guarantee of the United States of the repayment of Postal Savings System funds is not applicable because the Canal Zone had no postal savings system. The pledge by the bank was forbidden and void. The pledgee acquired no right or title in the illegally pledged assets. The Receiver may recover the pledged assets or their proceeds from appellants who are the responsible defendants in possession of the bank's property, and the suit may not be defeated upon the ground that it is one against the United States. Appellants do not and could not claim that the deposits made in the bank were public monies of the United States. At best their contention is that the Canal Zone Government is an instrumentality of the United States and that the ultimate loss is the loss of the United States because the United States is pledged to the repayment of deposits of its Postal Savings System which act was made applicable to the Canal Zone. As has been previously pointed out, the pledge of the

United States contained in its Postal Savings System Act has no application here because the Postal Savings System provided for the Canal Zone by Executive order of September 8, 1911 was terminated and abolished by the President of the United States by Executive order of September 5, 1914. The deposits were not public monies derived from revenues of the United States covered into the Treasury and in any event deposits of public money in national banks makes the banks debtors of the United States, and if security is not taken as the statute permits the claim of the United States is classified as a general claim on a parity with private creditors.

O'Connor v. Rhodes, 79 Fed. (2d) 146;
Cook County Bank v. U. S., 107 U. S. 445;
Branch v. U. S., 12 Ct. Cl. 281; aff'd. 100 U. S. 673;
Coudert v. U. S., 175 U. S. 178;
Tindal v. Wesley, 167 U. S. 204;
U. S. v. Lee, 106 U. S. 196;
Osborne v. U. S., 9 Wheaton 738;
Phila. Co. v. Stimson, 223 U. S. 605;
Miguel v. McCarl, 291 U. S. 442.

In *O'Connor v. Rhodes*, *supra*, this Court gave careful consideration to many of these questions and uniformly determined them against appellants' contention and in support of the arguments advanced in support of appellee's arguments herein made. The Court said:

"In *Branch v. United States*, 12 Ct. Cl. 281, affirmed 100 U. S. 673, 25 L. Ed. 759, it is said that the act of the Secretary in designating a national bank as a depository of public money does not change its character or organization; that it still

retains its identity as a national bank, and does not become the *custodian* of public money, but the *debtor* of the United States, precisely as in the case of other depositors. If security be not taken as the statute permits, the claim of the United States is on a parity with the claims of private creditors. *Cook County Bank v. United States*, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537. And in the case of *Coudert v. United States*, 175 U. S. 178, 20 S. Ct. 56, 44 L. Ed. 122, it was said that this section (5153) has relation only to public money of the United States. In that case money derived from the sale of a vessel captured during the war between the states as a blockade runner, and deposited by the marshal to await the order of the court as to its disposition, was held not public money of the United States. Public moneys were defined to be the revenues of the United States from all sources covered into the Treasury."

"* * It was, therefore, money of the bank out of which all creditors were entitled to be paid ratably. If it was improvidently paid to the Custodian, it is recoverable, and the officer whose act is responsible for the illegal payment is the responsible defendant, and the resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570."

"* * * * We, therefore, hold that this is not a suit against the United States. See *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570; *Miguel v. McCarl*, 291 U. S. 442, 54 S. Ct. 465, 78 L. Ed. 901; *Ex parte Young*, 209 U. S. 123, page 159, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; and see particularly *U. S. v. Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171."

In the *Cook County Bank v. U. S.*, *supra*, case the Court said:

“With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the Government should call for such security and, if it prove insufficient, take the position of other creditors in the distribution of the assets of the bank in case of its failure. The framers of the banking law evidently so regarded the matter.”

In *Tindal v. Wesley*, 167 U. S. 204, 221, the court said:

“We may repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this Court in *United States v. Peters*, 9 U. S. 5 Cranch, 115, 139: ‘It certainly can never be alleged that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.’ Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer or agent. The case here is not one in which judgment is asked against the defendants as officers of the state, nor one in which the plaintiff seeks to compel the specific performance by the state of any contract alleged to have been made by it, nor to enforce the discharge by the defendants of any specific duty enjoined by the state.”

In *United States v. Lee*, 106 U. S. 196, the court, in holding that a plea of sovereign immunity on behalf of the United States was not well taken, and that the

United States was not an indispensable party, said:

“The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the Court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States.”

Cases to the same effect are:

Osborne, et al., v. Bank of the United States, 9 Wheaton (22 U. S.) 738;
Lane, Secretary of the Interior v. Watts, 234 U. S. 525;
Philadelphia Company v. Stimson, 223 U. S. 605.

This Court, in *O'Connor v. Rhodes*, 79 Fed. (2) 146, points out that the matter does not touch deposits which belong to the defendants therein involved, but relates entirely to the assets of the bank which had been unlawfully pledged and which should be recovered for the benefit of the bank's general creditors. The court said at page 152:

“On the other hand, the excess which the bill charges the Alien Property Custodian received over and above other general creditors of the bank was a part of the trust assets of the insolvent bank. It was, therefore, money of the bank out of which all creditors were entitled to be paid ratably. If it was improvidently paid to the Custodian, it is

recoverable. * * * and the resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570."

Cases in like effect are:

South Carolina v. Wesley, 155 U. S. 542;
The Exchange, 7 Cranch 116;
Stanley v. Schwalby, 147 U. S. 508;
Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. Ed. 363;
Poindexter v. Greenhow, 114 U. S. 270; 287, 290, 293, 296, 297;
Davis v. Gray, 16 Wallace (83 U. S.) 203, 220, 221.

In the case of *O'Connor v. Rhodes*, *supra*, this Court, discussing this question with respect to the funds of the Alien Property Custodian, said at page 151:

"But what we have said as to the deposit of the Comptroller is not controlling in the cases of the deposits by the Fleet Corporation and the Alien Property Custodian, for no statute has been referred to, and we know of none, authorizing national banks to secure deposits of money by public officers generally. Certainly Congress has not specifically provided with relation to funds of the Alien Property Custodian or the Fleet Corporation. In this aspect, the funds of these two depositors are in all respects similar to a private deposit unless the fact that they are public moneys, as to which we express no opinion, changes the rule, and we think it does not; for in the Cook County Bank Case it was held that the claim of the United States for postal funds (which of course were public moneys) deposited by the postmaster at Chicago was entitled to no priority of

payment from the assets of an insolvent national bank over private deposits of private depositors. And so we are obliged to hold that on the present state of the record the pledge of securities to the Custodian and Fleet Corporation is invalid.”

CONCLUSION.

It is respectfully submitted that the Court below committed no error in entering a decree against appellants in favor of the Receiver of the District National Bank of Washington, and that such decree should be affirmed.

Respectfully submitted,

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APPENDIX.**REGULATIONS GOVERNING DEPOSIT OF PUBLIC MONEYS AND PAYMENT OF GOVERNMENT WARRANTS AND CHECKS.**

1919
Department Circular
No. 176.

TREASURY DEPARTMENT
Office of the Secretary

Public Moneys.

Washington, December 31, 1919.

To the Treasurer and Assistant Treasurers of the United States, Federal Reserve Banks, National Bank Depositories, Special Depositories of Public Moneys, Collectors of Internal Revenue, Collectors of Customs, Receivers of Public Moneys, Depository Postmasters, Marshals and Clerks of Courts, all other Officers or Agents of the United States engaged in collecting, depositing, or transmitting public moneys, and others concerned:

DEPOSIT OF PUBLIC MONEYS.

1. All public moneys shall be deposited with the Treasurer of the United States, Federal Reserve Banks and branches, Assistant Treasurers of the United States, and regular National bank depositories, and, as provided in paragraph 3 hereof, with special depositories under the act approved September 24, 1917, as amended and supplemented, all in accordance with the provisions of this circular and subject to the exceptions hereinafter provided. All deposits of public moneys hereunder (except with such special depositories) shall be for credit to the account of the Treasurer of the United States. The term "Federal Reserve Bank" where it appears in this circular, unless otherwise indicated by the context, includes branch Federal Reserve Banks with which deposits are au-

thorized to be made. All collectors, receivers of public moneys of every description, and other persons having public money to pay to the United States are hereinafter sometimes called depositors of public moneys.

GENERAL PROVISIONS AS TO DEPOSITARIES.

2. *Classes of depositaries.*—The established policy of the Treasury Department is to designate and maintain balances with regular National bank depositaries of public moneys only at points where a depositary is necessary to meet the requirements of Government officers for cash for pay-roll or other expenditures, and then only if there is no Federal Reserve Bank or branch located at or near the point. National banks when designated by the Secretary of the Treasury, however, may be depositaries of public moneys with a maximum qualification, for the sole purpose of receiving deposits made by United States courts and their officers, by postmasters, or by other duly authorized Government officers, for credit to their official disbursing accounts elsewhere than with the Treasurer of the United States, provided that such depositaries qualify, before receiving deposits, by pledging as collateral security for such deposits, including interest thereon, securities of the classes described in paragraph 26 hereof, to an amount, taken at the rates therein provided, at least equal to such deposits. National bank depositaries designated with a maximum qualification for this purpose alone are not thereby authorized to accept any other deposits hereunder. Deposits arising from the proceeds of sales of bonds, notes, and Treasury certificates of indebtedness of the United States, and the payment of income and profits taxes, may be made from time to time with special depositaries of public moneys under the act of Congress approved September 24, 1917, as amended and supplemented. Other deposits of public moneys are maintained with the several Federal Reserve Banks, pursuant to the provisions of Section 15 of the Federal Reserve Act, as amended. All inactive National bank depositaries

are being discontinued, pursuant to action already taken by the Secretary of the Treasury.

3. *Special depositaries.*—Any incorporated bank or trust company in the United States desiring to participate in deposits of public moneys arising from the sale of bonds, notes, or Treasury certificates of indebtedness of the United States, or from the payment of income or profits taxes, under Section 8 of the act approved September 24, 1917, as amended and supplemented, may make application for designation as a special depository of public moneys to the Federal Reserve Bank of its district, pursuant to Treasury Department Circular No. 92, as from time to time amended and supplemented. Detailed regulations governing such depositaries are prescribed in said circular, to which reference is hereby made. The remaining provisions of this circular do not apply to or govern special depositaries under said circular, and such depositaries are not, by virtue of such designation or their qualification thereunder, authorized to accept deposits hereunder from collectors or other depositors of public moneys for credit to the account of the Treasurer of the United States, or to the official disbursing accounts of Government officers.

GENERAL PROVISIONS AS TO DEPOSITS.

4. *Cash deposits.*—All cash received by collectors of internal revenue, collectors of customs, depository postmasters, and other depositors of public moneys shall be deposited, if the depositor is located in the same city with a Federal Reserve Bank or branch bank, with such Federal Reserve Bank or branch bank, and in other cases with the regular national bank depository or depositaries with which the depositor has been making such deposits, unless and until otherwise instructed by the Secretary of the Treasury: *Provided, however,* That depositors located in the District of Columbia shall make such deposits direct with the Treasurer of the United States. Payments made by

postal or express money order shall be handled, subject to collection, in the same manner as cash.

5. *Checks and drafts.*—All checks received by any Government officer are received subject to collection, and in the event that any check can not be collected or is lost or destroyed before collection, appropriate action must be taken by the depositor in the same manner as if no check had been received. Payments made by check are not effective unless and until the check has actually been duly collected and paid. All checks shall be deposited as hereinafter specifically provided. Bank drafts shall be handled hereunder in the same manner as checks.

6. *Certificates of deposit.*—Certificates of deposit shall be issued, until further notice, on the following forms: Internal Revenue, Form 15 (National Banks); Customs, Form 1¾ (National Banks); Public Lands, Surveys and Patent Fees, Form 1A (National Banks); Army, Navy, Judiciary, and Indian, Form 1 (National Banks); Surplus Money Order Funds, Forms 6594 and 6594A; Surplus Postal Funds, Form 6598; Deposits for official checking account with Treasurer of United States, Form 6599; and Sales of War-Savings securities, Form 1312. The original of each certificate of deposit (unless otherwise specifically instructed, as in cases where the funds represented thereby are not to be covered into the Treasury by warrant) shall be transmitted to the Secretary of the Treasury (Division of Public Moneys), through the office of the Treasurer of the United States, with the transcript on Form 17 (National Banks), on which the credit appears. The other certificates of deposit in the set should be disposed of in accordance with the instructions which appear on the certificate, and one copy may be retained by the depository for its own records. Federal Reserve Banks and branches shall see that the face of each certificate in any set of certificates of deposit covering in whole or in part items other than cash for which immediate credit is given, bears a legend read-

ing as follows: "This certificate of deposit issued subject to deduction for uncollectible items." It is of the utmost importance that certificates of deposit be properly issued, and in this connection, depositaries should give special attention to two points, viz: (1) The name and title (if any) of the depositor, as *John Doe, receiver of public moneys*, or, in cases where the deposit is made by one person for account of another person, *John Doe, receiver of public moneys, through Richard Roe*; and (2) the account or purpose for which the deposit is received, as *Sales of public lands*, or *Sales of War-Savings securities*, with a notation of the series, which should be clearly indicated in order to enable the Treasury Department to classify the deposit and credit the proper receipt account at the same time that the depositary is charged with the amount of the deposit. Depositaries receiving deposits of Internal Revenue receipts are particularly requested to use great care in specifying upon the face of certificates of deposit on Form 15 (National Banks) deposits of "Income and Profits Taxes" separate and distinct in each case from deposits of Miscellaneous Internal Revenue Collections (formerly called "Ordinary"). It is not necessary, however, to make any further separation of classes of Internal Revenue deposits on the face of certificates of deposit on Form 15 (National Banks).

7. *Unauthorized receipt or use of public money.*—Section 96 of the act of Congress approved March 4, 1909, provides the following penalties for the unauthorized receipt or use of public money:

Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose

not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

8. *Deposit of checks.*—On and after March 1, 1920, and until otherwise directed by the Secretary of the Treasury, all checks (including bank drafts) received by collectors of internal revenue, collectors of customs, depository postmasters, and other depositors of public moneys (except checks for deposit in authorized official disbursing accounts maintained by Government officers elsewhere than with the Treasurer of the United States) shall be deposited pursuant to the following instructions:

FOR SPECIAL ATTENTION OF COLLECTORS OF INTERNAL
REVENUE.

9. *Deposit of checks with Federal Reserve Banks and branches.*—All checks, whether certified or uncertified, and whether or not drawn on banks or trust companies located in the same city with the collector, received by collectors of internal revenue (hereinafter in this title called collectors) and their deputies in payment of internal revenue taxes, including income and profits taxes, shall be forwarded for deposit each day by collectors, unless otherwise specifically instructed by the Secretary of the Treasury, to the Federal Reserve Bank of the district in which the collector's head office is located (or, in case the head office is located in the same city with a branch Federal Reserve Bank, to such branch Federal Reserve Bank). Specific instructions may be given by the Secretary of the Treasury in certain instances for the deposit of checks with Federal Reserve Banks of other districts, and branches thereof. Collectors will make the neces-

sary arrangements for deposits by their deputies in accordance herewith. Stamp deputy collectors who are located away from the head office and who receive checks in payment of internal revenue taxes will forward them to the collectors of internal revenue for their respective district; provided, however, that if there is a Federal Reserve Bank or branch in the same city with the office of the stamp deputy collector, he shall at all times deposit such checks with such Federal Reserve Bank or branch.

10. *Classification of checks for deposit.*—Checks forwarded to the Federal Reserve Bank in accordance herewith must be accompanied by a letter of transmittal or a draft certificate of deposit (original, duplicate, and triplicate, in proper form, to be signed, dated, and numbered by the Federal Reserve Bank), and such letter of transmittal or draft certificate of deposit must, in all cases, specify the amount of the deposit representing Income and Profits Taxes separate and distinct from the amount representing Miscellaneous Internal Revenue Collections (formerly called “Ordinary”). The checks so forwarded may be inclosed under one outer wrapper, but must be separated into two classes, namely:

(1) Checks received exclusively in payment of income and profits taxes, inclosed in a separate package containing an inner wrapper or label plainly marked “Income and Profits Tax Checks only.”

(2) All other checks received (in whole or in part) in payment of other internal-revenue taxes, inclosed in a separate package containing an inner wrapper or label plainly marked “Internal Revenue Collections.”

Whenever practicable, collectors of internal revenue should arrange the checks so forwarded into at least two groups, namely:

(a) Checks drawn on banks and trust companies located in the same city with the Federal Reserve Bank or branch to which the checks are forwarded.

(b) Checks drawn on banks and trust companies located outside of the city in which is located the Federal Reserve Bank or branch to which the checks are forwarded.

11. *Indorsement, transmission, and collection of checks.*—The collector should stamp on the face of each check deposited the words, "This check is in payment of an obligation to the United States and must be paid at par. No protest," with his name and title. The Federal Reserve Bank will make an effort to collect every check on these terms. If the bank on which a check is drawn refuses to pay it at par, it will be returned to the collector in the same manner as a bad check. Checks received exclusively in payment of income and profits taxes, whether certified or uncertified, when forwarded to the Federal Reserve Bank, should be indorsed:

Pay to the order of the Federal Reserve Bank of

.....
(Insert name of city in which Federal Reserve Bank, not branch, is located.)
Income and Profits Tax Account.

All other checks whether certified or uncertified, when forwarded to the Federal Reserve Bank, should be indorsed:

Pay to the order of the Federal Reserve Bank of

.....
(Insert name of city in which Federal Reserve Bank, not branch, is located.)

Internal Revenue Collections.

The Checks must in all cases be forwarded by registered mail. Inasmuch as the indorsement is specific, it is not necessary that the checks be insured. Collectors and deputy collectors must, however, retain a record of the checks forwarded, so that if any checks are lost, payment may be immediately stopped and duplicates secured. Collectors are authorized by the Commissioner of Internal Revenue to incur any necessary

expense from the appropriation "Collecting the War Revenue," for postage and registration charges. When transmitting the checks to the Federal Reserve Bank, the collector should request the Federal Reserve Bank to issue a certificate of deposit on Form 15 (National Banks) in his name, and to send the duplicate and triplicate of the certificate of deposit to his office, for disposition in accordance with the instructions which appear on the margin of the certificate.

12. *Uncollected and lost checks.*—Taxpayers whose checks are returned uncollected by a depositary should be immediately notified by the collector to make the checks good. If any taxpayer should fail to comply, the collector should proceed to collect the taxes by the usual methods, as though no check had been given, and if he fails to make collection within thirty days will accept the return of the check from the Federal Reserve Bank and give receipt therefor on the reverse of Form N, copy attached. In the event that any checks for which a certificate of deposit has been given are reported lost after deposit, the collector will promptly notify the taxpayer that the check has been lost and request him to stop payment thereon and make payment by another check or cash in lieu of the original check. If the taxpayer refuses or neglects to comply, the collector should proceed to collect the taxes by the usual methods, as though no check had been given. If the taxpayer makes payment on account of the lost check, or the amount is otherwise collected, the amount should be delivered to the Federal Reserve Bank against the certificate of deposit already issued therefor. If at the expiration of thirty days the matter has not been satisfactorily adjusted, the collector will make full report to the Secretary of the Treasury, Division of Public Moneys, and receive specific instructions. Collectors are not authorized to give receipts to the depositary for lost checks.

FOR SPECIAL ATTENTION OF COLLECTORS OF CUSTOMS.

13. *Deposit of checks with Federal Reserve Banks and branches.*—All checks received by collectors of customs (hereinafter in this title called collectors and deputy collectors), whether or not such checks are drawn on banks and trust companies located in the same city with the collector, shall be forwarded for deposit each day by collectors, unless otherwise specifically instructed by the Secretary of the Treasury, to the Federal Reserve Bank of the district in which the collector's head office is located (or, in case the head office is located in the same city with a branch Federal Reserve Bank, to such branch Federal Reserve Bank). Specific instructions may be given by the Secretary of the Treasury in certain instances for the deposit of checks with Federal Reserve Banks of other districts, and branches thereof. Collectors will make the necessary arrangements for deposits by their deputies in accordance with this circular. Checks forwarded to the Federal Reserve Bank in accordance herewith must be accompanied by a letter of transmittal or a draft certificate of deposit (to consist of a full set, in proper form, to be signed, dated, and numbered by the Federal Reserve Bank), and such letter of transmittal or draft certificate of deposit must, in all cases, specify the amounts of the deposits representing collections for the Treasury Department, Department of Commerce and Department of Labor, separate and distinct from each other, and must make such further specification within each Department as shall be required.

14. *Indorsement, transmission, and collection of checks.*—The collector should stamp on the face of each check deposited the words, "This check is in payment of an obligation to the United States and must be paid at par. No protest," with his name and title. The Federal Reserve Bank will make an effort to collect every check on these terms. If the bank on which a check is drawn refuses to pay it at par, it will be returned to the collector in the same manner as a bad

check. All checks forwarded by the collector to the Federal Reserve Bank should be indorsed:

Pay to the order of the Federal Reserve Bank of

.....

(Insert name of city in which Federal Reserve Bank, not branch, is located.)

with appropriate specification as to the class of deposit. The checks must, in all cases, be forwarded by registered mail. Inasmuch as the indorsement is specific, it is not necessary that the checks be insured. Collectors and deputy collectors, must, however, retain a record of the checks forwarded so that if any checks are lost, payment may be immediately stopped and duplicates secured. Collectors are authorized to incur any necessary expenses from the appropriation for Collecting the Revenue from Customs, for postage and registration charges. When transmitting the checks to the Federal Reserve Bank, the collector should request the Federal Reserve Bank to issue a certificate of deposit on Form 1 $\frac{3}{4}$ (National Banks) in his name, and to make disposition of the certificates in the set in accordance with the instructions which appear on the certificate.

FOR SPECIAL ATTENTION OF POSTMASTERS.

15. *Deposit of checks with Federal Reserve Banks and branches.*—All checks received by State depository postmasters representing surplus postal funds, surplus money-order funds, and receipts from sales of War-Savings securities (except to the extent that surplus postal funds and surplus money-order funds may be required for use by the depository postmaster for authorized postal expenditures, or the redemption of War-Savings Certificates), whether or not such checks are drawn on banks and trust companies located in the same city with the postmaster, shall be forwarded for deposit each day, unless otherwise specifically instructed, to the Federal Reserve Bank of the district in which the post office is located (or, in case

the post office is located in the same city with a branch Federal Reserve Bank, to such branch Federal Reserve Bank). Specific instructions may be given by the Secretary of the Treasury in certain instances for the deposit of checks with Federal Reserve Banks of other districts, and branches thereof. The postmaster at Washington, D. C., shall make deposits hereunder with the Treasurer of the United States direct. Checks forwarded to the Federal Reserve Bank in accordance herewith must be accompanied by a letter of transmittal or a draft certificate of deposit (to consist of a full set, in proper form, to be signed, dated, and completed by the Federal Reserve Bank), and such letter of transmittal or draft certificate of deposit must, in all cases, make such specification as shall be required of postmasters by the Postmaster General, and by the instructions appearing on the certificate. The depository postmaster should stamp on the face of each check deposited the words, "This check in is payment of an obligation to the United States and must be paid at par. No protest," with his name and title. The Federal Reserve Bank will make an effort to collect every check on these terms. If the bank on which a check is drawn refuses to pay it at par, it will be returned to the postmaster in the same manner as a bad check. All checks forwarded by postmasters to the Federal Reserve Bank should be indorsed:

Pay to the order of the Federal Reserve Bank of

.....
(Insert name of city in which Federal Reserve Bank, not branch, is located.)

with appropriate statement showing whether the deposit is made on account of surplus postal funds, surplus money-order funds, or receipts from sales of War-Savings securities. The checks must, in all cases, be forwarded by official registered mail. Inasmuch as the indorsement is specific, it is not necessary that the checks be insured. Postmasters must, however, retain a record of the checks forwarded so that if any checks are lost, payment may be immediately stopped and

duplicates secured. When transmitting the checks to the Federal Reserve Bank, the postmaster should request the Federal Reserve Bank to issue a certificate of deposit on the appropriate form in his name, and to make disposition of the certificates in the set in accordance with the instructions which appear on the certificate.

FOR SPECIAL ATTENTION OF OTHER DEPOSITORS OF
PUBLIC MONEYS.

16. *Deposit of checks with Federal Reserve Banks and branches.*—All checks received by other depositors of public moneys, whether or not drawn on banks and trust companies in the same city with the depositor, including checks for deposit to the official credit of the depositor with the Treasurer of the United States (other than checks drawn on the Treasurer of the United States for deposit to the official credit of the depositor, which shall be deposited direct with the Treasurer), shall be forwarded for deposit each day, unless otherwise specifically instructed by the Secretary of the Treasury, to the Federal Reserve Bank of the district in which the depositor's head office is located (or, in case the head office is located in the same city with a branch Federal Reserve Bank, to such branch Federal Reserve Bank): *Provided, however,* That depositors located in the District of Columbia shall make deposits hereunder direct with the Treasurer of the United States: *And provided further,* That other depositors may in special cases make deposits hereunder with the Treasurer of the United States direct. Specific instructions may be given by the Secretary of the Treasury in certain instances for the deposit of checks with Federal Reserve Banks of other districts, and branches thereof. Checks forwarded to the Federal Reserve Bank in accordance herewith must be accompanied by a letter of transmittal or a draft certificate of deposit (to consist of a full set, in proper form, to be signed, dated, and completed by

the Federal Reserve Bank), and such letter of transmittal or draft certificate of deposit must in all cases make such specification of the deposit as shall be required of the officer making the deposit. The depositor should stamp on the face of each check deposited the words, "This check is in payment of an obligation to the United States and must be paid at par. No protest," with his name and title. The Federal Reserve Bank will make an effort to collect every check on these terms. If the bank on which a check is drawn refuses to pay it at par, it will be returned to the depositor in the same manner as a bad check. All checks forwarded by the depositor to the Federal Reserve Bank should be indorsed:

Pay to the order of the Federal Reserve Bank of

.....
(Insert name of city in which Federal Reserve Bank, not branch, is located.)

with appropriate statement showing the specific account for which the deposit is made. The checks must, in all cases, be forwarded by registered mail. Inasmuch as the indorsement is specific, it is not necessary that the checks be insured. Depositors must, however, retain a record of the checks forwarded, so that if any checks are lost payment may be immediately stopped and duplicates secured. Necessary expenses for postage and registration charges should be borne by such appropriation as may be available, and should not in any event be deducted from the amount of the deposit. If the depositor has no appropriation available to pay such charges, he should make prompt report of the facts to the Secretary of the Treasury, Division of Public Moneys, and request instructions. When transmitting the checks to the Federal Reserve Bank, the depositor should request the Federal Reserve Bank to issue a certificate of deposit on the appropriate form in his name, the certificates in the set to be disposed of in accordance with the instructions which appear on the certificate.

17. *For special attention of officers of United States courts and United States attorneys.*—United States attorneys, marshals, and clerks of United States courts, who receive public moneys accruing to the United States from fines, penalties, and forfeitures, fees, costs, forfeitures of recognizances, moneys arising from unclaimed wages and effects of seamen that have remained in the registry of the courts for more than six years, unclaimed moneys remaining in court registry five years or longer, debts due the United States, interest on such debts, sales of public property, or from any other sources, except as stated below, will deposit the same in accordance with the foregoing paragraphs. Moneys collected in cases for violation of customs, navigation, equipment of motor boats, steamboat-inspection, immigration and Chinese exclusion laws should be paid to the collector of customs in the district or port in which the case arose. Fines for importation of opium or having opium in possession under act of February 9, 1909, amended January 17, 1914, should also be paid to the collector of customs. Moneys collected in criminal cases under the internal revenue laws, including fines for making smoking opium under law of January 17, 1914, or under the anti-narcotic act of December 17, 1914, should be paid to the collector of internal revenue in the district in which the case arose. But fines arising from violation of section 240, Criminal Code, should be deposited by the clerk of court collecting same to the credit of the Treasurer of the United States. Moneys collected as damages on account of trespass on the national forests should be paid to the fiscal agent of the forest service district in which the case arose. Fines and costs should be deposited to the credit of the Treasurer of the United States. Fines collected under sections 52 and 53, Criminal Code (setting fire to timber on public lands or failing to extinguish same), should be paid to the proper county officer for the public school fund of the county where the land is situated. Costs should be deposited to the credit of the Treasurer of the United

States. Moneys collected in Indian suits involving rentals, leasing, damages, etc., of Indian property or allotments for use of the particular Indian owners, should be paid to the disbursing officer for the agency having jurisdiction over them. Costs should be deposited to the credit of the Treasurer of the United States. Moneys (including costs) collected in civil or criminal post-office cases should be transmitted to the Solicitor of the Treasury, by draft or check, made payable to the order of the Treasurer of the United States.

FOR SPECIAL ATTENTION OF FEDERAL RESERVE BANKS.

18. *General Provisions.*—Federal Reserve Banks and branches will be expected to remain open during usual banking hours for the purpose of receiving deposits hereunder. Unless and until otherwise instructed by the Secretary of the Treasury, Federal Reserve Banks and branches will not receive deposits by postmasters or other Government officers for credit in their official disbursing accounts maintained elsewhere than with the Treasurer of the United States, nor deposits made by United States courts and their officers, unless for the depositor's credit through the account of the Treasurer of the United States with the Federal Reserve Bank or branch.

19. *Internal revenue checks.*—Federal Reserve Banks are requested, where possible, to give immediate credit in the Treasurer's general account and issue certificate of deposit for the full amount of all checks received from collectors of internal revenue pursuant to this circular. In the event that any checks for which a certificate of deposit has been given are returned to the Federal Reserve Bank as unpaid for any reason, the collector should be promptly notified and the check or checks should be held in suspense for a few days while the collector makes an effort to collect the amount. If he fails to make collection within thirty days, the check or checks should be returned to the collector and his receipt taken therefor, on the reverse

of Form N, copy attached. This receipt must show the date, number, and amount of each certificate of deposit in which the amount of the unpaid check (or checks) was included, and the class of the deposit, as Income and Profits Taxes, or Miscellaneous Internal Revenue. The Federal Reserve Bank, upon obtaining such receipt from the collector, will immediately charge the amount, with appropriate description, in its current transcript of the Treasurer's account on Form 17, and forward therewith in support of the entry the receipt given by the collector with a debit voucher, both on Form N, copy attached, a supply of which will be forwarded by the Treasury Department to each Federal Reserve Bank for this purpose. In the event that any checks for which a certificate of deposit has been given are lost after deposit, the collector should be promptly notified and the items held in suspense for not exceeding thirty days while the collector endeavors to have payment on the lost check stopped and to secure another check or cash in lieu of the original check. If the taxpayer refuses or neglects to make prompt payment, the collector will proceed as in the case of a delinquent taxpayer. If at the expiration of thirty days the matter has not been satisfactorily adjusted, the Federal Reserve Bank should make full report to the Secretary of the Treasury, Division of Public Moneys, and request specific instructions before making any charges for the lost item in the Treasurer's account. Checks received from collectors of internal revenue for which the Federal Reserve Bank is not willing to give immediate credit should be credited by the Federal Reserve Bank in a special collection account, for a period not in excess of five days, and when collection has been made or the five-day period has elapsed, the collection account should be charged and the Treasurer's account credited, and a certificate of deposit should be issued in the usual manner, unless the check has been returned unpaid. If a check deposited in the collection account should be returned unpaid, and no certificate of deposit has been issued therefor, it should be re-

turned to the depositor and the amount charged to the collection account. Federal Reserve Banks are requested to use great care in observing the collector's classification of deposits of internal revenue collections, and in specifying upon the face of certificates of deposit on Form 15 (National Banks) deposits of "Income and Profits Taxes" separate and distinct in each case from deposits of Miscellaneous Internal Revenue Collections (formerly called "Ordinary"). In this connection Federal Reserve Banks will observe that checks forwarded in the separate package marked "Internal Revenue Collections" may contain items in payment of income and profits taxes as well as miscellaneous internal revenue collections.

20. *Customs checks.*—Federal Reserve Banks are requested where possible, to give immediate credit in the Treasurer's general account and issue certificate of deposit for the full amount of all checks received from collectors of customers pursuant to this circular. In the event that any checks for which a certificate of deposit has been given are returned to the Federal Reserve Bank as unpaid for any reason, the collector should be promptly notified and the check or checks should be held in suspense for a few days while the collector makes an effort to collect the amount. If he fails to make collection within a reasonable time, the check or checks should be returned to the collector and his receipt taken therefor, on the reverse of Form N, copy attached. This receipt must show the date, number, and amount of each certificate of deposit in which the amount of the unpaid check (or checks) was included, and the class of the deposit, as Customs, or the like. The Federal Reserve Bank, upon obtaining such receipt from the collector, will immediately charge the amount, with appropriate description, in its current transcript of the Treasurer's account on Form 17, and forward therewith in support of the entry the receipt given by the collector with a debit voucher, both on Form N, copy attached, a supply of which will be forwarded by the Treasury Department to each Federal

Reserve Bank for this purpose. In the event that any checks for which a certificate of deposit has been given are lost after deposit, the collector should be promptly notified and the items held in suspense for not exceeding thirty days while the collector endeavors to have payment on the lost check stopped and to secure another check or cash in lieu of the original check. If at the expiration of thirty days the matter has not been satisfactorily adjusted, the Federal Reserve Bank should make full report to the Secretary of the Treasury, Division of Public Moneys, and request specific instructions before making any charges for the lost item in the Treasurer's account. Checks received from collectors of customs for which the Federal Reserve Bank is not willing to give immediate credit should be credited by the Federal Reserve Bank in a special collection account for a period not in excess of five days, and when collection has been made, or the five-day period has elapsed, a certificate of deposit should be issued in the usual manner, unless the check has been returned unpaid. Federal Reserve Banks are requested to use great care in observing the collector's classification of deposits of Customs collections, and in specifying upon the face of certificates of deposit on Form 1 $\frac{3}{4}$ (National Banks) deposits representing collections for the Treasury Department, Department of Commerce, and Department of Labor, separate and distinct from each other, and to make such further specification within each department as may be indicated by the collector.

21. *Other checks.*—Federal Reserve Banks are requested, where possible, to give immediate credit in the Treasurer's general account and issue certificate of deposit for the full amount of all other checks received from depositors of public moneys pursuant to this circular. In the event that any checks for which a certificate of deposit has been given are returned to the Federal Reserve Bank as unpaid for any reason, or are lost after deposit, the depositor should be promptly notified and the item or items should be held

in suspense for not exceeding thirty days while the depositor makes an effort to collect the amount. If he fails to make collection within this time, the Federal Reserve Bank should make full report to the Secretary of the Treasury, Division of Public Moneys, and request specific instructions. The Federal Reserve Bank will not, without further authority therefor, charge the Treasurer's account with the amount of such checks. Checks received from such depositors for which the Federal Reserve Bank is not willing to give immediate credit should be credited by the Federal Reserve Bank in a special collection account, for a period not in excess of five days, and when collection has been made or the five-day period has elapsed, a certificate of deposit should be issued in the usual manner, unless the check has been returned unpaid. Federal Reserve Banks are requested to use great care in observing the depositor's classification of deposits, and in specifying the classes of deposits upon the face of certificates of deposit on the appropriate form.

22. *Checks drawn on banks outside district.*—Checks received by Federal Reserve Banks in accordance with this circular which are drawn on banks in other Federal Reserve districts should be collected in the usual manner and should not be charged in the Treasurer's general account as transfers of funds to other Federal Reserve Banks.

FOR SPECIAL ATTENTION OF ASSISTANT TREASURERS OF
THE UNITED STATES.

23. Collectors of internal revenue, collectors of customs, and depository postmasters are not authorized to make deposits hereunder with Assistant Treasurers of the United States. Inasmuch as there is a Federal Reserve Bank or branch located in every city except Washington in which an Assistant Treasurer is located, it is expected that so far as possible all deposits of public moneys will be made with the Federal Reserve Banks or branches rather than with Assistant

Treasurers. Deposits on account of the five per cent redemption funds shall be made until further notice, with the Treasurer or an Assistant Treasurer of the United States.

FOR SPECIAL ATTENTION OF NATIONAL BANK
DEPOSITARIES.

24. *General provisions.*—National bank depositaries are not authorized to maintain any collection account for deposits of public moneys, but are required to give immediate credit in the Treasurer's account and to issue certificate of deposit for the full amount of all public moneys deposited with them for credit in the Treasurer's account in accordance with this circular. Except pursuant to specific instructions to that effect from the Secretary of the Treasury, no deposits of checks will be made hereunder with National bank depositaries for credit to the account of the Treasurer of the United States.

25. *Excess balances.*—National bank depositaries, whenever they hold funds to the credit of the Treasurer of the United States in excess of the authorized balance, shall make immediate transfer of such excess funds to the Treasurer or an Assistant Treasurer of the United States, or to the Federal Reserve Bank of the district, or, in special cases, to branches of Federal Reserve Banks. National bank depositaries, whenever they hold funds to the credit of other Government officers, pursuant to paragraph 27 hereof, in excess of the collateral value of the security deposited therefor, shall promptly report the facts to the Secretary of the Treasury, Division of Public Moneys, and deposit additional security to cover such deposits.

26. *Collateral security for deposits with regular National bank depositaries.*—From the date of this circular, and until further notice, securities of the following classes, and no others, will be accepted as security for deposits of public moneys with regular National bank depositaries, and at the rates below provided:

(a) Bonds, notes, and Treasury certificates of indebtedness of the United States, of any issue, including outstanding interim certificates or receipts for payments therefor; all at par.

(b) Bonds of the Federal Land Banks, bonds of the War Finance Corporation, bonds of Porto Rico and the District of Columbia, and bonds and certificates of indebtedness of the Philippine Islands; all at par.

(c) The $3\frac{1}{2}$ per cent bonds of the Territory of Hawaii at 90 per cent of market value; and other bonds of said Territory at market value, not to exceed par.

All securities to be deposited as collateral security for such deposits must be deposited with the Treasurer of the United States. On or before June 30, 1920, National bank depositaries will be required to substitute securities of the classes above described for all securities not falling within said classes deposited with the Treasurer of the United States as security for such deposits.

27. *Court and post-office funds, etc.*—National bank depositaries designated with a maximum qualification for the sole purpose of receiving deposits made by United States courts and their officers, by postmasters for credit to their official disbursing accounts and by other Government officers authorized to maintain disbursing accounts elsewhere than with the Treasurer of the United States are not authorized to receive deposits for credit to the account of the Treasurer of the United States. Such depositaries are required to forward to the Treasurer of the United States at the end of each week, and at the end of each month, a report on Form 17 (National Banks), showing the aggregate amounts of such deposits, and to the Secretary of the Treasury, Division of Public Moneys, at the end of each week, and at the end of each month, a report on Form 7 (National Banks), showing in detail the deposits to the credit of the local postmaster, the United States court or its officers, and other authorized special

accounts. Bankruptcy funds and postal savings deposits should not be included in these reports.

28. *Interest on deposits.*—Each National bank depository will be required to pay interest at the rate of 2 per cent per annum on daily balances, including deposits received pursuant to paragraph 27 hereof. Interest will be calculated on an actual day's basis, and shall be paid semiannually on January 1 and July 1 in each year, 1 per cent for each six-months' period.

PAYMENT OF GOVERNMENT WARRANTS AND CHECKS.

29. *Federal Reserve Banks and branches.*—Federal Reserve Banks and branches shall make arrangements to cash Government warrants and checks drawn on the Treasurer of the United States for disbursing officers of the War Department and Navy Department, and other Government officers, provided that satisfactory identification of the officer shall be furnished. The Treasurer will upon special request advise Federal Reserve Banks and branches as to the balances to the credit of such officers. Each Federal Reserve Bank and branch will cash Government warrants and checks drawn on the Treasurer of the United States when they are presented and properly indorsed by responsible incorporated banks and trust companies who guarantee all prior indorsements thereon, including the indorsement of the drawer when the check is drawn in his favor. Warrants and checks cashed by Federal Reserve Banks and branches shall be charged to the account of the Treasurer of the United States, subject to examination and payment by the Treasurer. Federal Reserve Banks and branches will not be expected to cash Government warrants and checks presented direct to the bank by the general public.

30. *National bank depositaries and Assistant Treasurers.*—Each regular National bank depository with an authorized balance to the credit of the Treasurer of

the United States, and each Assistant Treasurer of the United States will cash Government warrants and checks drawn on the Treasurer of the United States when they are presented and properly indorsed by responsible holders who guarantee all prior indorsements thereon, including the indorsement of the drawer when the check is drawn in his favor. Warrants and checks so cashed by Assistant Treasurers shall be charged to the account of the Treasurer of the United States, subject to examination and payment thereof by the Treasurer. Regular National bank depositaries are not required to charge Government warrants and checks cashed by them in the account of the Treasurer of the United States, except in cases where checks drawn on the Treasurer of the United States are deposited for the official credit of the drawer or the credit of other Government officers in the account of the Treasurer of the United States and in cases where cash is furnished to a Government officer upon the warrant or check for pay-roll or other expenditures.

31. *Payment by Treasurer.*—The Treasurer of the United States reserves the usual right of the drawee to examine, when received, all Government warrants and checks cashed by Assistant Treasurers, Federal Reserve Banks and branches, and National bank depositaries, and to refuse payment thereon. Three years after the close of the fiscal year (June 30) in which they are drawn, warrants and disbursing officer's checks are *not* payable by the Treasurer of the United States, but should be sent to the Secretary of the Treasury, Division of Public Moneys, for payment from the "Outstanding liabilities" appropriation.

OTHER PROVISIONS.

32. All previous regulations and instructions inconsistent herewith are hereby superseded, including, so far as inconsistent herewith, the provisions of Treasury Department Circulars No. 5, dated April 6, 1916, No. 105, dated December 27, 1917, and No. 144, dated May 20, 1919.

33. Except as herein otherwise specifically provided, nothing contained in this circular shall be deemed to affect deposits by postmasters to the credit of their official disbursing accounts, the deposit of court funds by United States courts and their officers, or the deposit of Postal Savings funds, in cases where such deposits are not for credit by the depositary in the account of the Treasurer of the United States. Unless specifically extended thereto by the Secretary of the Treasury, nothing contained in this circular shall be deemed to apply to or govern the deposit of public moneys in Federal land banks or joint stock land banks under the act approved July 17, 1916, as amended.

34. The provisions of this circular do not apply to or govern the deposit of public moneys or the payment of Government warrants and checks outside of the continental United States, except to the extent specifically extended by the Secretary of the Treasury from time to time.

35. The Secretary of the Treasury may withdraw or amend at any time or from time to time any or all of the provisions of this circular.

CARTER GLASS,
Secretary of the Treasury.

FORM N.

[Obverse.]

Group as paid checks.	First sort. General ledger section.	Second sort. Symbol
Treasurer's office	DEBIT VOUCHER	Form N.

....., 192...

.....of.....

(Name of Federal Reserve Bank or branch.)

Debit has been made this day in transcript of Treasurer's general account for uncollectible checks de-

posited by.....in payment of..... and re-
turned to the depositor as unpaid, as per receipt on
reverse hereof, in the amount of \$.....

.....
Cashier.

NOTE.—Forward with transcript in support of entry

[Reverse.]

Received....., 192...., from
..... of,
(Name of Federal Reserve Bank or branch.)

uncollectible checks amounting to \$.....,
which amount was included in certificates of deposit
issued by said bank as follows:

Certificate No.	Date of certificate.	Total amount of certificate.
Classification of deposit (as in- come and profits taxes, miscel- laneous internal revenue, cus- toms, miscellaneous receipts, official checking account, surplus postal funds, surplus money-or- der funds, War-Savings securi- ties, etc.).	Amount of uncollectible checks in- cluded in each certificate.	

Total, \$.....

.....
(Name and title of depositor.)

.....District of.....

ESTABLISHING THE POSTAL SAVINGS SYSTEM IN THE
CANAL ZONE.

By virtue of the authority vested in me, I hereby establish the following Order for the Canal Zone:

Section 1. There is hereby established in the post-offices²⁹⁰ of the Canal Zone a postal savings system,²⁹¹ to be operated without the payment of interest on the deposits under such rules and regulations as may be now or hereafter adopted.

Section 2. There is hereby created a Board of Trustees for the control, supervision, and administration of the postal savings depository offices designated and established under the provisions of this Order, and of the funds received as deposits at such postal savings depository offices by virtue thereof. Said board shall consist of the Collector of Revenues of the Canal Zone, the Auditor of the Canal Zone Government, and the Treasurer of the Canal Zone, severally, acting *ex officio*, and shall have power to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repayment of the funds deposited at postal savings depository offices; the regulations above mentioned to be subject to the approval of the Chairman of the Isthmian Canal Commission.

Section 3. Said Board of Trustees is hereby authorized and empowered to designate such post-offices as it may select to be postal savings depository offices, and each and every post-office so designated by order of said Board is hereby declared to be a postal savings depository office within the meaning of this Order and to be authorized and required to receive deposits of funds from the public and to account for and dispose of the same, according to the provisions of this Order and the regulations made in pursuance thereof. Each postal savings depository office shall be kept open for

²⁹⁰ Temporary postal service established in Canal Zone by Executive Order of June 24, 1904, p. 27. Permanent postal service created by act No. 8 of Commission (L. C. Z. 61).

²⁹¹ This order repealed by Executive Order of Sept. 5, 1914, p. 199, which, however, provided for a money-order savings deposit without fee.

the transaction of business during such hours as the Collector of Revenues shall direct.

Section 4. That accounts may be opened and deposits made in any postal savings depository established under this Order by any person of the age of ten years or over, in his or her own name, and by a married woman in her own name and free from any control or interference by her husband; but no person shall at the same time have more than one postal savings account in his or her own right.

Section 5. At least one dollar, or a larger amount in multiples thereof, must be deposited before an account is opened with a person depositing the same; and one dollar, or multiples thereof, may be deposited after such account has been opened. Postal savings deposits will be evidenced by postal savings certificates issued in fixed denominations of \$1, \$2, \$5, \$10, \$20, \$50, \$100, each bearing the name of the depositor, the number of his account, the date of issue, and the name of the depository office.

Section 6. Any depositor may withdraw the whole or any part of the funds deposited to his or her credit upon demand, and under such regulations as the Board of Trustees may prescribe.

Section 7. Postal savings funds received under the provisions of this Order shall be deposited with the Treasurer of the Canal Zone under such regulations as the Board of Trustees may prescribe.

Section 8. Postal savings depository funds shall be kept separate from other funds by postmasters and other officers and employees of the postal service, who shall be held to the same accountability under their bonds for such funds as for public moneys; and no person connected with the Post-Office Department shall disclose to any person other than the depositor the amount of any deposits, unless directed so to do by the Collector of Revenues.

Section 9. That the final judgment, order, or decree of any court of competent jurisdiction adjudicating any right or interest in the credit of any sum deposited

by any person with the postal savings depository, if the same shall not have been appealed from, and the time for appeal have expired, upon submission to the Collector of Revenues of a copy of the same, duly authenticated in the manner provided by the laws of the United States for the authentication of the records and judicial proceedings of the courts of any state or territory, or of any possession subject to the jurisdiction of the United States, when the same are proved or admitted within any other court within the United States, shall be accepted by the Board of Trustees as conclusive of the title, right, interest, or possession so adjudicated; and any payment of said sum in accordance with such order, judgment, or decree shall operate as a full and complete discharge of the United States and the Canal Zone Government from the claim or demand of any person or persons to the same.

Section 10. This Order shall take effect and be in force sixty days from and after this date.

WM. H. TAFT.

THE WHITE HOUSE,
September 8, 1911.

[No. 1409]

To Repeal the Executive Order of Sept. 8, 1911, Establishing the Postal Savings System in the Canal Zone.

By virtue of the authority vested in me, I hereby establish the following order for the Canal Zone:

Section 1. The Executive Order of *September 8, 1911*, establishing the Postal Savings System in the Canal Zone,⁴⁸¹ is hereby repealed: *Provided*, That accounts opened in accordance with that order, and the regulations established thereunder, shall continue as prescribed in said order and regulations until they are finally closed by the withdrawal of the deposits.

⁴⁸¹ p. 117.

Section 2. For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, *money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.*⁴⁸²

Section 3. This order shall take effect from and after October 1, 1914.

WOODROW WILSON.

THE WHITE HOUSE, 5 September, 1914.

[No. 2040.]

Providing for the payment of interest on Deposit Money Orders issued in the Canal Zone.

By virtue of the authority vested in me by law, it is hereby ordered:

1. That *deposit money orders* issued by the Canal Zone Postal Service⁵³¹ shall bear interest at the rate of one-half of one percentum for each period of three full calendar months, from August 21, 1916, or subsequent date of issue. Interest shall be payable when the order is paid but shall not accrue on any order for more than three years.

2. The Governor of The Panama Canal is authorized to prescribe such detailed rules and regulations as may be necessary to carry out this order.

WOODROW WILSON.

THE WHITE HOUSE, 22 October, 1916.

[No. 2479.]

⁴⁸² By Executive Order of Oct. 22, 1916, p. 218, one-half of 1 per cent interest for each period of 3 full calendar months allowed on savings deposits.

⁵³¹ Provided by Executive Order of Sept. 5, 1914, p. 109, which order also repealed the existing Postal Savings System.

